Jurisdictional Statement

81-1700

No. ______________

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

ROBERT J. GILLILAND, MARY P. FITZ, JAMES S. GILLILAND, and FRANK M. GILLILAND,

Petitioners,

vs.

CITY OF PALMDALE and COUNTY OF LOS ANGELES,

Respondents.

APPEAL FROM
COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Is it constitutionally permissible for a state court to hold unqualifiedly that payment of just compensation for taking private property for public use is *never* available as a remedy when such taking is by a regulation which deprives the property owner of use of his property?

2. Is it constitutionally permissible for a state court to hold unqualifiedly that the *only* remedy available to a property owner whose property has been taken by a regulation depriving him of use of his property, is to seek judicial invalidation of such regulation?

3. Is it constitutionally permissible for a state court to hold, without any factual inquiry as to whether the regulated property is *in fact* economically or physically capable of being put to uses theoretically permitted by the regulation, that as the regulation *says* that some uses are permitted, such statement *ipso facto* disproves the landowners' allegations that in fact the regulation renders the property useless and worthless?

4. Is is constitutionally permissible for a state to regulate for the express purposes of violating the Fifth and Fourteenth Amendment prohibitions against devoting property to a public use without compensating the owner?

5. Is it constitutionally permissible for a state to refuse to enforce federal remedies when a federal cause of action is prosecuted in that state's courts?

6. On the facts at bench, where the Appellants' property was stultified by regulation into uselessness and worthlessness, does the constitutional policy of fairness require that the ensuing economic burden be borne by the benefited public as a whole and not be disproportionately placed on the Appellants?

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No. ____________

IN THE
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October Term, 1981

ROBERT J. GILLILAND, MARY P. FITZ, JAMES S. GILLILAND, and FRANK M. GILLILAND,

Petitioners,

vs.

CITY OF PALMDALE and COUNTY OF LOS ANGELES,

Respondents.

JURISDICTIONAL STATEMENT

THE OPINIONS BELOW

Two opinions were issued by the California Court of Appeal in related cases. *Gilliland v. City of Palmdale* (hereafter, the *Palmdale* case) was reported at 127 Cal.App.3d 386, 179 Cal.Rptr. 627. A copy is Appendix A. The California Supreme Court, pursuant to its plenary supervisory power over published case law (Rule 976, Calif. Rules of Ct.), ordered the opinion deleted from the official reports (see de-publication order, Appendix G). *Gilliland v. County of Los Angeles* (hereafter, the *County* case) is reported at 126 Cal.App.3d 610, ____ Cal.Rptr.____ . A copy is Appendix D.

JURISDICTION

This inverse condemnation appeal is brought by the owners of 33.3 acres of vacant property located near the end of a runway at an Air Force base (called Plant 42) in Palmdale, California.

Five acres are located within the City of Palmdale, while the remaining 28.3 acres are located across the street in unincorporated territory under the planning and zoning jurisdiction of the County of Los Angeles.

Separate actions were filed against Palmdale and the County, alleging that the zoning actions of those entities had deprived the property of any feasible, beneficial use, thus taking the property without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution. Palmdale and the County had stultified the use of the property pursuant to an agreement with the United States Air Force to maintain a clear zone at the end of Plant 42's runways.

The property owners sought compensation pursuant to the United States Constitution and the Civil Rights Act (42 U.S.C. § 1983).

In the ***County*** case, the trial court sustained a general demurrer to the complaint and dismissed the action (App J).

In the ***Palmdale*** case, the trial court granted a motion for judgment on the pleadings 1/, concluding that no taking could be alleged, and dismissed the action (App I).

On appeal, the California Court of Appeal, Second District, Division One, affirmed both judgments, concluding that no taking could be alleged. Additionally, the ***County*** opinion states that no damages could be awarded even if a taking were proved, in light of the California Supreme Court's decision in ***Agins v. Tiburon*** (1979) 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25, *aff'd on other grounds* (1980) 447 U.S. 255 (App D, p. 8). The ***Palmdale*** opinion, on the other hand, states that ***Agins***' rejection of a damages remedy "... flatly contradicts clear precedent of United States Supreme Court cases ..." (App A, p. 7), and concludes that if a taking were present, compensation would be appropriate.

1/ Under California law, a motion for judgment on the pleadings is the functional equivalent of a general demurrer (*e.g.*, ***Tiffany v. Sierra Sands Unified School Dist.*** [1980] 103 Cal.App.3d 218, 222, 162 Cal.Rptr. 669).

The Judgment of the Court of Appeal in the ***County*** case was rendered November 25, 1981 (App D), and certified for publication December 10, 1981 (App E). A timely Petition for Rehearing was denied December 17, 1981 (App F).

The Judgment of the Court of Appeal in the ***Palmdale*** case was rendered December 7, 1981 (App A), and certified for publication January 6, 1982 (App B). A timely Petition for Rehearing was denied January 6, 1982 (App C).

Timely Petitions for Hearing were filed in both cases in the California Supreme Court. After extending its time to act, the California Supreme Court denied the Petitions February 10, 1982 (App G, H). At the same time, the ***Palmdale*** opinion, which called attention to the conflict between the California Supreme Court's ***Agins*** opinion and this Court's decisions regarding inverse condemnation compensation, was ordered "de-published" and removed from the official reports (App G).

Timely Notices of Appeal to this Court were filed March 5, 1982 (App K, L).

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2).

Cases sustaining this Court's jurisdiction on appeal to review state court judgments concerning regulatory takings of private property without just compensation are: ***Penn Central Transp. Co. v. City of New York*** (1978) 438 U.S. 104; ***Moore v. City of East Cleveland*** (1977) 431 U.S. 494; ***Goldblatt v. Town of Hempstead*** (1962) 369 U.S. 590; ***Village of Euclid v. Ambler Realty Co.*** (1926) 272 U.S. 365; and ***Pennsylvania Coal Co. v. Mahon*** (1922) 260 U.S. 393.

This single jurisdictional statement is filed pursuant to Rule 10(6), Rules of the United States Supreme Court.

SUGGESTION THAT CONSIDERATION OF THIS APPEAL BE JOINED WITH THE PETITION FOR CERTIORARI IN *GILLILAND v. UNITED STATES*, NO. 81-1242.

As noted above, the ***reason*** for Palmdale and the County denying the property owners the ability to use their land was to preserve it for a clear zone for Air Force Plant 42. At the hearing on the zone change, the Air Force representatives convinced Palmdale and the County that use ought to be denied because of the large number of noisy and dangerous flights over the subject property. (The representations are reproduced in Appendix A to the Petition in No. 81-1242, pp. 12-15.)

It was not possible to sue Palmdale, the County and the Air Force in the same court, as the Air Force could be sued *only* in the United States Court of Claims, while Palmdale and the County *could not* be sued there.

THIS COURT NOW HAS THE FIRST JUDICIAL OPPORTUNITY TO EXAMINE THE EFFECTS OF THE INTERACTION OF ALL THREE GOVERNMENT AGENCIES ON THE SUBJECT PROPERTY. The Gillilands and Mrs. Fitz respectfully ask that the cooperative governmental efforts which rendered the property useless be examined together.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment, United States Constitution:

> ". . . nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment, United States Constitution:

> "SECTION 1. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

The pertinent County ordinance is reproduced in Appendix N, and the City ordinance in Appendix M.

RAISING THE FEDERAL QUESTION

The complaints in both cases alleged a taking of the subject property for public use without compensation, thus depriving the Gillilands and Mrs. Fitz of their property without compensation and without due process of law, in violation of the

Fifth and Fourteenth Amendments. The federal constitutional question was thus raised at the earliest possible time, and reiterated in every brief filed in the trial court and on appeal.

STATEMENT OF THE CASE

This appeal arises from the California Court of Appeal's affirmance of the dismissal of the property owners' inverse condemnation and declaratory relief actions. Thus, the facts come from the complaints which, for purposes of review, are taken as true and are liberally construed under both Federal and California law. 2/

The Gillilands and Mrs. Fitz own 33.3 acres of vacant property in the County of Los Angeles at the main entrance to the Lockheed facility, adjacent to Air Force Plant 42. Five acres are located in the City of Palmdale, while the remaining 28.3 acres are across the street, in unincorporated territory subject to the jurisdiction of the County. Air Force Plant 42 is an airport with manufacturing conducted on the premises by defense contractors. Plant 42 has approximately 3,900 employees. The Lockheed facility at Plant 42 is reputed to have the largest building ever constructed in California. It houses 6,000 to 12,000 employees, depending on what projects are being pursued. The B-1 bomber will be built at Plant 42.

The property is beneath the approach path for Runway 4 and departure path for Runway 22 of Plant 42's airport. 3/

The owners purchased their property in 1965 and 1967, as an investment for future use. Since that time, at the request of the City of Palmdale, the owners have granted easements to the County and Palmdale to permit the urban, commercial

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2/ *See Conley v. Gibson* (1957) 355 U.S. 41, 47-48; *Stevens v. County of Dutchess* (S.D. N.Y. 1977) 445 F.Supp 89, 91; *Commercial Standard Ins. Co. v. Bank of America* (1976) 57 Cal.App.3d 241, 129 Cal.Rptr. 91.

3/ All runways have two numerical (compass-oriented) designations. Thus, if an aircraft departs Plant 42 *to* the southwest, it is said that Runway 22 is being used. An aircraft landing *from* the southwest is said to be using Runway 4. It is the same strip of concrete. The number reveals the direction of use on the compass (220° and 40°).

development taking place in the area surrounding the property.

The subject property is zoned agricultural (A 2-5), a zone used by Palmdale and the County at the time of the property's purchase as a "holding zone." A holding zone is one which permits virtually no use. Palmdale and the County restrict use of holding zone land until the area is ripe for development and Palmdale or the County are satisfied with a specific plan for its use, at which time a zone change is enacted to permit the use.

Holding zones are a familiar tool of land planners. For example, the California continuing education zoning text notes:

> "Hold zoning is usually used in areas in which the market has as yet caused little development, the community is not certain what uses eventually to permit in the area, and it is not planning on making that decision in the near future. The area may not be zoned at all, and as a consequence, uses may appear that would be incompatible with present or future development. In order to control possible incompatible uses, the land is zoned, typically for very unintensive uses, and all other uses are subject to conditional use permit treatment . . . *For example, the area may be zoned agricultural, not because that is planned as a permanent use, but because that is a convenient and often available category of unintensive use.*" (Hagman, Larson & Martin, *California Zoning Practice* [CEB 1969] § 6.26 at 215-216; emphasis added.)

In his nationally utilized treatise, Professor Williams summarizes the case law on holding zones as follows:

> "In these cases, the existence of a holding zone, designed to delay development for one reason or another, has been noted in passing, as if it were one of the more familiar legal devices, and with no suggestion that any serious legal problem is presented. In some of these cases, a holding zone has been

> established on the theory that no one could tell what the future land use was going to be; and so a large reservoir of *vacant land has been put into a zone where the regulations would tend to discourage development — but with the understanding that, when conditions were right for development, the land could be transferred into another and perhaps quite different zone.*" (3 Williams, *American Land Planning Law* [1975] § 73.34 at 388; emphasis added.)
>
> "Another group of decisions — some brought by neighbors and some by developers — has also involved rezonings for less restrictive use, and has been met with the casual comment that in any event the previous zone was merely a *holding zone*, and *not intended to be taken too seriously.*" (3 Williams, § 73.34 at 390; emphasis added.)

Indeed, this Court seems no stranger to holding zones, as the ordinance examined in ***San Diego Gas & Elec. Co. v. City of San Diego*** (1981) 450 U.S. 621, 67 L.Ed.2d 551, was said to possess ". . . an agricultural 'holding' category." (450 U.S. at ____, 67 L.Ed.2d at 555.)

In other words, the A 2-5 zone was *not* placed on the subject property because the A 2-5 uses *were* appropriate, but because they were *not*. That way the property could be kept unused until Palmdale and the County approved a specific rezoning plan.

In 1973, conditions in the general vicinity had made the subject property ripe for development and the owners applied for a change from their agricultural/holding zone to a commercial planned development zone.

The property surrounding the area of the subject property is zoned either M 1-1/2 or M 2-1/2, allowing various kinds of manufacturing and commercial uses.

In April 1973, the County Board of Supervisors denied the application as to the 28.3 acres in its jurisdiction.

In May 1973, the Palmdale City Council denied the application for the 5 acres in its jurisdiction, rejecting the

Palmdale Planning Commission's unanimous recommendation to grant the zone change.

The Air Force mobilized opposition to the owners' applications among the defense contractors at Air Force Plant 42, and convinced Palmdale and the County to keep the property useless because of its proximity to Air Force Plant 42.

The action of Palmdale and the County was in furtherance of an agreement with the Air Force that property within one mile of Plant 42, like the subject property, would be used as the Air Force wished.

The land remaining in the A 2-5 zone, which includes the subject property, forms a clear zone at the end of one of Plant 42's runways. The Air Force desired that clear zone and Palmdale and the County provided it.

Thus, by their actions in 1973, Palmdale and the County *de facto* changed the zoning of the subject property from holding to agricultural. It was *not* a mere refusal to rezone. Rather, it was an announcement that the property would no longer be considered as holding zone property. Because it was at the end of the airport runway, the property would thereafter be treated as though it were really zoned for agriculture, for which it is incapable of being used.

Palmdale and the County, by enforcing their agreement to provide the Air Force with a clear zone, have destroyed the value of the subject property. 4/

The owners believe that the actions of Palmdale and the County have taken their property for public use without compensation, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act (42 U.S.C. § 1983).

The owners acknowledged below that California law provides no adequate remedy at law under these circumstances (citing ***Agins***), and prayed for redress under federal law.

4/ It bears note that, while Palmdale and the County insist on maintaining this property as vacant land for an Air Force clear zone, the County's Assessor values — and taxes — the property for its highest and best use, commercial or industrial development. The County Assessor understands that the holding zone's agricultural designation was not intended as a real indicator of the property's potential use.

Palmdale's motion for judgment on the pleadings ignored federal law, and sought dismissal on the basis of ***Agins***. The County's demurrer did likewise.

The trial court dismissed both actions (App I, J).

In the ***County*** case, the Court of Appeal likewise followed ***Agins***. That court refused to apply a damages remedy to a federal Civil Rights Act case (App D, p. 8).

In the ***Palmdale*** case, a different panel of the Court of Appeal declined to follow ***Agins*** on the remedy issue, recognizing that this Court's interpretation of the United States Constitution must take precedence over contrary interpretations of the California Supreme Court (App A, p. 8). In *both* cases, however the Court of Appeal misconstrued the actions of Palmdale and the County in *changing* the *use* of the A 2-5 zoning in such a way that the property was *de facto* down-zoned from a holding zone with developmental potential to an agricultural zone with no value or use. The Court of Appeal, instead, dealt only with the *facial* constitutionality of the zoning, rather than the constitutionality of the zoning *as applied*, which was the gravamen of the owners' cause of action (*see, e.g.*, App A, p. 2; App D, p. 13). 5/

5/ The Court of Appeal ignored the complaint's allegation that the agricultural zoning rendered the property valueless, and relied on the wording of the zoning ordinance which theoretically permitted some use. But this is a *pleading* case. If permitted to go to trial, it could be proved that the theoretically permitted uses are a sham. For example, the following potential uses (noted at App A p. 2) are unrealistic — rendering the property not economically viable — because of the high noise levels and danger from aircraft crashes: one-family dwellings; animal hospitals, schools and kennels and veterinary offices; youth camps and other campgrounds; auction grounds; stock breeding and yards; riding academies and stables. The adverse impact of aircraft noise on animals is legendary (*see, e.g.*, ***United States v. Causby*** [1946] 328 U.S. 256, [chickens]; ***Wildwood Mink Ranch v. United States*** [D. Minn. 1963] 218 F.Supp 67 [mink]; ***Sawyer v. United States*** [M.D. Ga. 1956] 148 F.Supp 877 [mule]; ***Dahlstrom v. United States*** [8th Cir. 1956] 228 F.2d 819 [horses]). As for agricultural uses, another court has noted the unsuitability of this area for agriculture. (***Stone v. City of Los Angeles*** [1975] 51 Cal.App.3d 987, 992, 124 Cal.Rptr. 822) In any event, it seems abusive of discretion not to permit leave to amend to so plead if such factual detail is felt to be needed.

The California Supreme Court denied hearings in both cases (App G, H).

In doing so, it sent a clear message to this Court: the message is that the California Supreme Court has no intention of conforming with this Court's interpretation of the United States Constitution until directly ordered to do so.

Please recall that following ***Agins***, this Court considered ***San Diego Gas & Elec. Co. v. City of San Diego*** (1981) 450 U.S. 621 (hereafter ***San Diego G & E***). Though a majority of this Court believed the judgment was not final and the appeal was therefore dismissed, Justice Brennan authored a four-Justice dissenting opinion on the merits, with which one of the majority (Justice Rehnquist) indicated agreement, and with which the lead opinion did not differ. The dissenting opinion has been widely read by lower courts [6] and commentators [7] as expressing this Court's view of the merits and indicating the proper result (i.e. compensation) if a case were brought here in an appropriate procedural posture.

Given this Court's broad hint in ***San Diego G & E***, one might have expected the California Supreme Court to take this opportunity to re-examine its ***Agins*** conclusion. After all, it had not only ***San Diego G & E*** for assistance, but the direct criticism of the New Hampshire Supreme Court and the analysis of the California Court of Appeal in the ***Palmdale*** case. The New Hampshire Supreme Court bluntly and unanimously concluded:

> "We reject [the ***Agins***] approach out of hand. It is contrary to our well-established law, which goes back at least as far as . . . [1872]. It is also, we

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[6] ***E.g., Burrows v. City of Keene*** (N.H. 1981) 432 A.2d 15, 20; ***Devines v. Maier*** (7th Cir. 1981) 665 F.2d 138, 142; ***Hernandez v. City of Lafayette*** (5th Cir. 1981) 643 F.2d 1188, 1198-1200; ***see Gilliland v. City of Palmdale*** (1981) 127 Cal.App.3d 386, 392-393, 179 Cal.Rptr. 627, 631.

[7] ***E.g.***, Hagman, ***Comment*** (May 1981) 33 Land Use Law & Zoning Digest 5; Kanner, ***Comment*** (May 1981) 33 Land Use Law & Zoning Digest 8, 9; Bonderman, ***Comment*** (May 1981) 33 Land Use Law & Zoning Digest 10; Shedd, ***Inverse Condemnation: A Lingering Question When Challenging Zoning Regulations*** (1981) 17 Law Notes For the General Practitioner 103, 109.

> believe, in violation of the Constitution of the United States. *See [San Diego G & E]* (Brennan, J., dissenting and Rehnquist, J., concurring)." (***Burrows v. City of Keene*** [N.H. 1981] 432 A.2d 15, 20.)

And the ***Palmdale*** opinion candidly acknowledged that, "California's position [in ***Agins***] flatly contradicts clear precedent of United States Supreme Court cases . . ." (127 Cal.App.3d at 392-393, 179 Cal.Rptr. at 631, App A, p. 7.)

After extending its time to consider these cases, the California Supreme Court apparently decided to thumb its nose at this Court. While refusing to hear either case, it ordered the forthrightly critical ***Palmdale*** opinion deleted from the published reports (App G), while leaving the ***County*** opinion as published precedent. Please recall that the ***County*** opinion concludes that ***Agins*** bars the recovery of damages in a land use case brought under the federal Civil Rights Act (42 U.S.C. § 1983) and prosecuted in California courts (App D, p. 8). This, in spite of the explicit holding of this Court in ***Owen v. City of Independence*** (1980) 445 U.S. 622, 650-651, that:

> "A damages remedy against the offending party [in a Civil Rights Act case] is a vital component of any scheme for vindicating cherished constitutional guarantees, . . ."

Thus, by its actions in these cases, the California Supreme Court has reaffirmed its intent to defy this Court's interpretation of the United States Constitution. By itself, that shows a need for this Court's intervention.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

INTRODUCTION

> "After all, if a policeman must know the constitution, then why not a planner?" 8/

That common-sense statement by Justice Brennan in ***San Diego G & E***, apparently expressing the views of at least five members of this Court, is at the heart of this case. For years,

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8/ ***San Diego G & E***, 450 U.S. at 661, fn. 26 (Brennan J., dissenting).

the judiciary has protected the constitutional rights of those suspected of crime by insisting that the police know and obey the Constitution. Failure of the police to "... know the Constitution ..." can result in awards of damages (*e.g., **Monroe v. Pape*** [1961] 365 U.S. 167). [9] In ***San Diego G & E***, this Court was seen as serving notice that *all* government employees must "... know the Constitution ..." or face the consequences of their ignorance. [10] Property owners deserve no less protection of their Fourteenth Amendment rights than that afforded accused criminals.

The California courts, however, have failed to heed this Court's message. As demonstrated by the decisions below, the California courts have:

- created their own interpretation of the Just Compensation Clause, in preference to (and in contradiction of) this Court's interpretation;
- used their erroneous constitutional interpretation to reject a damages remedy under the Civil Rights Act, in contradiction of this Court's holdings;
- refused to consider the impact of unconstitutional municipal motivation, in contradiction of this Court's holdings; and
- invoked stringent pleading rules to avoid determining these cases on the merits, in contradiction of this Court's holdings.

The issues involved on this appeal have aroused national interest for at least a decade. The lack of direct guidance from this Court has permitted California to defy the plain import of consistent federal law. There is now a sufficient "track record" to know that California's courts will continue that defiance without a distinct message from this Court.

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[9] ***Monroe*** held the individual police officers liable, but immunized the City. Seventeen years later, in ***Monell v. Dept.of Social Services*** (1978) 436 U.S. 658, cities were subjected to Civil Rights Act liability.

[10] See notes 6-7 and accompanying text.

Such defiance, when successful, is not ignored by other courts. When other states see California's tactic succeed, they will be tempted to emulate it when the occasion arises.

CALIFORNIA HAS CHOSEN TO DEFY THIS COURT'S INTERPRETATION OF THE UNITED STATES CONSTITUTION.

The headline may seem startling. It is nonetheless true.

The California Supreme Court's explication of the law governing takings conflicts sharply with this Court's interpretation of the Constitution. 11/ A comparison of the California Supreme Court's decision in ***Agins*** with Justice Brennan's opinion in ***San Diego G & E*** clearly demonstrates the conflict:

Agins	**San Diego G & E**
"We review the availability of inverse condemnation as a land owner's remedy when a public agency has adopted a zoning ordinance which substantially limits use of his property. We will conclude that although a land-owner so aggrieved may challenge both the constitutionality of the ordinance and the manner in which it is applied to his property by seeking to establish the invalidity of the ordinance either through the remedy of	"Invalidation unaccompanied by payment of damages would hardly compensate the land owner for any economic loss suffered during the time his property was taken. "Moreover, mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause. That guarantee was designed to bar the government from forcing some individuals to bear burdens which, in all fairness,

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11/ As the Court of Appeal in the ***Palmdale*** case candidly expressed it, "California's position [in ***Agins***] flatly contradicts clear precedent of United States Supreme Court cases." (App A, p. 7) Of course, the price of such candor was a depublication order from the California Supreme Court (App G).

Agins	San Diego G & E
declaratory relief or mandamus, he may not recover damages on the theory of inverse condemnation." (24 Cal.3d at 269-270, 598 P.2d at 26, 157 Cal.Rptr. at 373.)	should be borne by the public as a whole. [Citations.]" (450 U.S. at 656.)
"In combination, the need for preserving a degree of freedom in the land-use planning function, and the inhibiting financial force which inheres in the inverse condemnation remedy, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation is the appropriate relief under the circumstances." (24 Cal.3d at 276-277, 598 P.2d at 31, 157 Cal.Rptr. at 378.)	"But the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments made by the legislative, executive, or judicial branches. Nor can the vindication of those rights depend on the expense in doing so. [Citation.]" (450 U.S. at 660-661.)
"We are persuaded by various policy considerations to the view that inverse condemnation is an inappropriate and undesirable remedy in cases in which unconstitutional regulation is alleged." (24 Cal.3d at 275, 598 P.2d at 29, 157 Cal.Rptr. at 376.)	"The only constitutional requirement is that the landowner must be able meaningfully to challenge a regulation that allegedly effects a taking, and recover just compensation if it does so." (450 U.S. at 660.)

Thus, the difference between California's interpretation and this Court's interpretation is that this Court has called for enforcement of the Fourteenth Amendment's incorporation of the Fifth Amendment in land use cases where there is substantial impairment of value. The lower federal courts have followed this Court's lead (see pp. 20-21 herein). The California Supreme Court's decision in ***Agins***, on the other hand, ignores the Fourteenth Amendment in cases viewed as "regulation" cases, even when all value is destroyed. In other words, ***Agins*** ignores that which Justice Brennan's opinion in ***San Diego G & E*** concluded was fundamental (450 U.S. at 660):

> "The only constitutional requirement is that the landowner must be able meaningfully to challenge a ***regulation*** that allegedly effects a taking, ***and recover just compensation*** if it does so." (Emphasis added.)

The importance of compensation in constitutional cases was emphasized by this Court in ***Owen v. City of Independence*** (1980) 445 U.S. 622, 650-651:

> "The central aim of the Civil Rights Act was to provide protection to those persons wronged by the '"[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law."'
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> * * *
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> "***A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees***, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." (Emphasis added.)

In its recent decision in ***Burrows v. City of Keene*** (1981) 432 A.2d 15, a unanimous New Hampshire Supreme Court (speaking through Chief Justice Grimes) compared ***Agins*** and ***San Diego G & E*** and found the ***Agins*** analysis logically, morally and constitutionally wanting:

"We are aware of cases such as ***Agins v. Tiburon***, 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25 (1979), ***aff'd on other grounds*** 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), which hold that a landowner who is the victim of an excessive use of the police power may not recover damages for inverse condemnation but must be satisfied with the remedies of mandamus or declaratory judgment to invalidate the regulation.

"***We reject this approach out of hand.*** It is contrary to our well-established law, which goes back at least as far as ***Eaton v. B. C. & M. R. R.***, 51 N.H. 504 (1872). ***It is also, we believe, in violation of the Constitution of the United States. See San Diego Gas & Elec. Co. v. City of San Diego***, 101 S.Ct. at 1294, 1301-08 (Brennan, J., dissenting and Rehnquist, J., concurring). ***We agree with Justice Brennan*** that it is always open to the governmental entity involved to rescind or repeal the offending regulation and thus avoid payment of damages for inverse condemnation from that point on. ***Id. Limiting the landowner to actions which only invalidate the offending regulation will encourage municipal planners and other public officials to attempt to throw the burdens accompanying 'progress' upon individual landowners rather than on the public at large.*** The allowance of damages for inverse condemnation during the period of the taking, however, should encourage such officials to stay well on the constitutional side of the line, ***San Diego Gas & Elec. Co. v. City of San Diego, supra*** at 1308 n. 26 (Brennan, J., dissenting), and should also discourage harassment of property owners by repeated amendments of zoning regulations and the enactment of new ones. ***See id.*** at 1305-06 n. 22.

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"As we have said before, ***public officials have a duty to obey the constitution, and they have no***

> *right or legitimate reason to attempt to spare the public the cost of improving the public condition by thrusting that expense upon an individual.* [Citations]" (*Burrows*, 432 A.2d at 20; emphasis added.)

An interesting analysis of *Agins* appears in Willemsen & Phillips, *Down-Zoning and Exclusionary Zoning in California Law* (1979) 31 Hastings L.J. 103. Its insights are intriguing because one of its authors is identified as a career research attorney (since 1969) for the California Supreme Court. Appearing in print six months after the California Supreme Court decided *Agins*, it may reveal some of the thinking of those inside that court.

Willemsen and Phillips open by noting understatedly that:

> ". . . California law has taken a unique course, rendering decisions of other jurisdictions of little relevance to the California practitioner." (31 Hastings L.J. at 104.)

Later in the article, it is revealed that one of those ". . . other jurisdictions . . ." whose decisions are deemed ". . . of little relevance . . ." is the federal judicial system:

> "In rejecting the remedy of damages for inverse condemnation, California courts have charted a unique course. Their decisions, although resting on principles of fiscal policy and flexibility in planning, put California at odds with some of the federal courts, particularly the Northern District of California. Consequently landowners are likely to file future inverse condemnation actions in federal instead of state courts, thus *forcing the federal courts to face the question of whether to follow HFH and Agins* [i.e., California law] *or to adhere to federal precedents.*" (31 Hastings L.J. at 121; footnotes omitted; emphasis added.)

The concept of "choosing" between precedents of the California Supreme Court and the federal courts on issues of federal constitutional law (as though this court and the lower federal courts were some sort of "foreign" jurisdiction) likewise appears in the *County* opinion at bench. There, recall, the Court of Appeal chose to apply the California *Agins* interpretation of the United States Constitution, holding that a damages remedy *could not* be applied by a California court in a federal Civil Rights Act case (App D, p. 8). 12/

One would have thought the issue settled no later than Appomattox.

California's position is anathema to this Court's consistent holdings. For example, in *Testa v. Katt* (1947) 330 U.S. 386, this Court reviewed the subject and concluded:

> "[*Claflin v. Houseman* (1876) 93 U.S. 130] repudiated the assumption that federal laws can be considered by the states as though they were laws emanating from a foreign sovereign. Its teaching is that the Constitution and the laws passed pursuant to it are the supreme laws of the land, binding alike upon states, courts, and the people, 'anything in the Constitution or Laws of any State to the contrary notwithstanding.' . . . *[T]he obligation of states to enforce these federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide.*" (330 U.S. at 390-391; emphasis added; footnote omitted.)

Likewise, in the Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. Ry Co.* [1912] 223 U.S. 1), this Court dismissed the concept that state courts could decline to enforce a federal statute which did not suit the policies of the state:

> "The suggestion that the act of Congress is not in harmony with the policy of the State, and therefore that the courts of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist. When *Congress*, in the exertion of the

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12/ California's position is reminiscent of the famous "speech" by the trial judge in *Estes v. Texas* (1965) 381 U.S. 532 (quoted in the Chief Justice's concurring opinion, 381 U.S. at 566) in which he proclaimed that his oath was to uphold the *state* constitution, rather than the *federal*.

> power confided to it by the Constitution, adopted that act, it *spoke for all the people and all the States*, and thereby established a policy for all. *That policy is as much the policy of Connecticut as if the act had emanated from its own legislature*, and should be respected accordingly in the courts of the State." (223 U.S. at 57; emphasis added.)

Mondou's reasoning is no less applicable when Constitutional rights are at stake.

Plainly, California has set its courts on a collision course with this Court's established precedents. In the words of Willemsen and Phillips:

> ". . . California law has taken a unique course, rendering decisions of other jurisdictions of little relevance to the California practitioner." (31 Hastings L.J. at 104.)

It is recognized that there is a view on this Court that state judges ". . . are as capable as are federal judges of enforcing the Constitution of the United States, and have taken the same oath to do so . . ." (*E.g.*, ***Brockett v. Spokane Arcades, Inc.*** [1981] ____ U.S. ____, ____, 70 L.Ed.2d 468 [the Chief Justice, joined by Justices Powell and Rehnquist, dissenting from a summary affirmance].) Nonetheless, it is now clear that the California judiciary refuses to enforce the Constitution in conformity with this Court's precedents. A quick end to California's "unique" unconstitutional foray is deserved.

THIS COURT'S ATTENTION IS NEEDED TO END THE NATIONAL ANARCHY ON "THE TAKING ISSUE."

The problem at bench goes beyond California. A national debate, which has simmered hotly for more than a decade, has gone past the boiling point. There has been no lack of either scholarly discourse or judicial decisionmaking on the extent to which a government agency may "regulate" property before it crosses the line and "takes" the property. 13/

13/ *E.g.*, Ackerman, ***Private Property and the Constitution*** (1977); Bosselman, Callies & Banta, ***The Taking Issue*** (1973); Hagman & (continued)

But in attempting to apply the federal constitutional prohibition against taking property without compensation, the state courts have reached results so widely divergent as to be called anarchic. Citizens of the several states are subjected to disparate interpretations of the same federal constitutional right.

For example, New Jersey has held that even a one year freeze on land use requires the purchase of a one year option to purchase the property (***Lomarch Corp. v. City of Englewood*** [N.J. 1968] 237 A.2d 881), while California finds an uncompensated five year moratorium constitutionally permissible (***State v. Superior Court*** [1974] 12 Cal.3d 237, 115 Cal.Rptr. 497, 524 P.2d 1281).

And Wisconsin has held that zoning agriculturally unusable land as agricultural is unconstitutional (***Kmiec v. Town of Spider Lake*** [Wis. 1973] 211 N.W.2d 471), while California finds it acceptable (***Helix Corp. v. City of San Diego*** [1978] 82 Cal.App.3d 932, 147 Cal.Rptr. 683; ***see also*** the cases at bench).

The lower federal courts, on the other hand, have been generally consistent in concluding that the oppressive use of the planning, zoning or police powers can be a violation of the Civil Rights Act and the United States Constitution, requiring compensation. ***See e.g.***:

> ***Wheeler v. City of Pleasant Grove*** (5th Cir. 1981) 664 F.2d 99;
> ***Hernandez v. City of LaFayette*** (5th Cir. 1981) 643 F.2d 1188;
> ***Devines v. Maier*** (7th Cir. 1981) 665 F.2d 138;
> ***Dahl v. City of Palo Alto*** (N.D. Cal. 1974) 372 F.Supp 647;

13/ (continued) Misczynski, ***Windfalls For Wipeouts*** (1978); Michelman, ***Property, Utility, and Fairness: Comments on the Ethical Foundations of Just Compensation Law*** (1967) 80 Harv.L.Rev. 1165; Van Alstyne, ***Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria*** (1970) 44 S.Cal.L.Rev. 1; Berger, ***To Regulate or Not to Regulate — Is That The Question? Reflections on the Supposed Dilemma Between Environmental Protection and Private Property Rights*** (1975) 8 Loy.L.A.L.Rev. 253 [the author is counsel to the Appellants herein].

Arastra Limited Partnership v. City of Palo Alto (N.D. Cal. 1975) 401 F.Supp 962 [14/];

Cordeco Dev. Corp. v. Vazquez (D. Puerto Rico 1972) 354 F.Supp 1355;

Inmobiliaria Borinquen, Inc. v. Garcia Santiago (D. Puerto Rico 1969) 295 F.Supp 203;

Shellburne, Inc. v. New Castle County (D. Del. 1968) 293 F.Supp 237, 245;

Sanfilippo v. County of Santa Cruz (N.D. Cal. 1976) 415 F.Supp 1340;

6th Camden Corp. v. Evesham Township (D. N.J. 1976) 420 F.Supp 709;

M. J. Brock & Sons, Inc. v. City of Davis (N.D. Cal. 1975) 401 F.Supp 354;

Rasmussen v. City of Lake Forest (N.D. Ill. 1975) 404 F.Supp 148;

Lerner v. Town of Islip (E.D. N.Y. 1967) 272 F.Supp 664.

The facts which were held by the lower federal courts to state causes of action in these cases ranged from large-lot zoning [15/] (*Dahl*; *Sanfilippo*; *Rasmussen*; *Lerner*), to freezes on development (*Inmobiliaria*; *M. J. Brock*), to down-zoning (*Shellburne*); to open space zoning (*Arastra*), to denial of permits or rezoning (*Hernandez*; *Cordeco*; *Sanfilippo*; *6th Camden*).

The California Supreme Court's unwillingness to provide this remedy has led lawyers to file cases involving unreasonable land use restrictions in United States District Courts. That has added an increment of litigation to already over-burdened District Courts in California.

But some federal courts have felt constrained by this Court's view of the abstention doctrine to avoid dealing with

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[14/] As part of a settlement by which the City paid the property owners $7,500,000, this opinion was later vacated (417 F Supp 1125). (See Berwanger, *Recent Developments in Judicial Relief for Owners of Land Limited to Public Open Space* [1976] 52 L.A. Bar Jour. 196, 197, fn. 4.)

[15/] *I.e.*, requiring lots so large that development is not economically feasible.

land use controversies, 16/ thus relegating the parties to the uncertain vicissitudes of the state courts. Both systems get burdened. Land owners are mistreated. And the process of the law gets deserved criticism.

It is time for more uniform treatment.

In his insightful constitutional law text, Professor Tribe may have provided an apt beginning in determining what constitutes a taking:

> "Thus a clear case is one that intuitively seems like a taking in the layman's sense of that term: a physical takeover of a distinct entity, with an accompanying transfer of the legal powers of enjoyment and exclusion that are typically associated with rights of property. Moreover, *forcing someone to stop doing things with his property — telling him 'you can keep it, but you can't use it' — is indistinguishable, in ordinary terms, from grabbing it and handing it over to someone else*. Thus a 'taking' occurs in this ordinary sense when government controls a person's use of property so tightly that, although some uses remain to the owner, the property's value has been virtually destroyed." (Tribe, *American Constitutional Law* [1978] at 460; emphasis added; footnotes omitted.)

Professor Tribe's description dovetails with this Court's earlier comments on takings. (*E.g.*, *San Diego G & E*, 450 U.S. at ____, 67 L.Ed.2d at 571; *Kaiser Aetna v. United States* [1979] 444 U.S. 164, 175; *Andrus v. Allard* [1979] 444 U.S. 51, 65; *Penn Central Transp. Co. v. City of New York* [1978] 438 U.S. 104, 123-124; *Agins v. City of Tiburon* [1980] 447 U.S. 255, 261, 263.)

Likewise, the simplicity of such a formulation — which examines the reality of the impact on the property owner — makes for simplicity in pleading. This also conforms to this Court's feelings about Civil Rights Act pleading in particular

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16/ *E.g.*, *Santa Fe Land Imp. v. City of Chula Vista* (9th Cir. 1979) 596 F.2d 838; *Sederquist v. City of Tuburon* (9th Cir. 1978) 590 F.2d 278.

(***Gomez v. Toledo*** [1980] 446 U.S. 635, 640), and civil pleading in general (***Conley v. Gibson*** [1957] 355 U.S. 41, 47-48).

On the other hand, the California treatment is exemplified by the ***Palmdale*** opinion which based its dismissal of the owners' case on the following quibble:

> "Plaintiff claims that the refusal to rezone his land for commercial development denies him the 'beneficial' and 'only *economically feasible*' use of his land. The legal question, however, is whether it denies him '*economically viable* use' [citation] . . ." (App A, p. 12; emphasis added.)

With all respect, it is difficult to either understand or explain the supposed difference between what the complaint alleges (no "economically feasible use") and what California says must be alleged (no "economically viable use"). Certainly, if "viable" is the magic word which accomplishes what "feasible" does not, it was an abuse of discretion to deny leave to amend. 17/ The clear intent of the complaint was to allege that the City's actions deprived the owners of the ability to make *any* use of the property. To end this Civil Rights case on such quibbling construction seems unworthy.

In land use cases under the Civil Rights Act, this Court and the lower federal courts have required neither the detail nor the precision imposed on the owners by the California courts.

For example, in ***Lake Country Estates v. Tahoe Reg. Plan. Com.*** (1979) 440 U.S. 391, the allegations were sparse. (The allegations may be found in the Court of Appeals' opinion ***sub nom. Jacobson v. Tahoe Reg. Plan. Com.*** [9th Cir. 1977] 566 F.2d 1353.) The property owners alleged only that the

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17/ It may be worth noting that the author of the Court of Appeal's opinion appears to have used "feasible" and "viable" interchangeably. ***See*** App A, p. 11, where the plaintiff in the ***6th Camden*** case was said to have stated a cause of action because the land ". . . could not feasibly be used . . .", and where the plaintiff in the ***Hernandez*** case was said to have stated a cause of action because the land ". . . was not feasible for the use permitted . . .". What happened to the irreplaceable allegation of no ***viable*** use? Why is it appropriate for the Court of Appeal to interchangeably use these words but fatal for the owners to do so?

zoning on their land had been changed from residential or commercial to general forest district, recreation district or conservation reserve and that the rezoning constituted a taking (566 F.2d at 1357-1358). In fact, the allegations were said to be so brief and conclusory that there were not even sufficient facts to rebut the presumption of constitutionality generally accorded governmental actions (566 F.2d at 1359, fn. 9). Nonetheless, a cause of action was found, both by the Court of Appeals (566 F.2d at 1359, fn. 9) and this Court (440 U.S. at 398-400). Moreover, as here, the face of the ***Lake Country*** ordinance purported to permit some uses, to wit:

> "Generally, the ordinance allowed very limited residential use, and no tourist, residential or commercial use, of the rezoned land. Other permitted uses included hiking trails, campgrounds, stables, recreation camps, skiing facilities, timber growing, livestock grazing and electrical substations. In addition, outdoor recreation concessions and educational facilities were allowed in the 'Recreation District.'" (566 F.2d at 1358.)

Notwithstanding the facial allowance of ***some*** use, a cause of action was held stated in ***Lake Country***, contrary to the cases here.

Moreover, in ***Hernandez v. City of Lafayette*** (5th Cir. 1981) 643 F.2d 1188, which the Court of Appeal holds up as an example of how to properly plead a taking (App A, p. 13), the facts were ***not*** in the complaint, but in affidavits filed in opposition to a motion for summary judgment (643 F.2d at 1200). Likewise, in ***6th Camden Corp. v. Evesham Township*** (D. N.J. 1976) 420 F.Supp 709, another case cited by the Court of Appeal (App A, p. 11), the complaint simply alleged that the Township's actions rendered the property ". . . sterile and useless . . ." (420 F.Supp at 713). Factual detail was supplied by evidence beyond the complaint's allegations (420 F.Supp at 722). In neither of those cases (or any others of which we are aware) was a plaintiff required or expected to plead ***evidentiary*** facts showing the specific inappropriateness of each "use" theoretically authorized by the zoning. Rather, the *ultimate* fact that the zoning rendered the property near worthless was sufficient.

Moreover, it must be remembered that the property owners were pleading *federal* causes of action. State technicalities of pleading may not be used to evade *federal* rights. As this Court long ago held, speaking through Mr. Justice Holmes:

> "Whatever springes the state may set for those who are endeavoring to assert rights that the state confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." (***Davis v. Wechsler*** [1923] 263 U.S. 22, 24.)

The property owners seek only the same treatment as the plaintiffs in cases like ***Lake Country, Hernandez*** and ***6th Camden***: to have their allegations liberally construed and the opportunity to substantiate them with evidence. The allegations show the same sort of deprivation of ability to use land. It is unseemly for differing rules of pleading to determine the outcome of a federal constitutional decision.

THIS COURT'S ATTENTION IS NEEDED TO END THE NATIONAL ANARCHY ON "THE COMPENSATION ISSUE."

If the state courts are in disarray in deciding what is a "taking" under the United States Constitution, they are no less so in deciding on a remedy. Professor Kanner, surveying the field two years ago, concluded that, ". . . the state courts' endeavors form a chaotic pattern . . ." (Kanner, ***Inverse Condemnation Remedies in an Era of Uncertainty*** [Southwestern Legal Foundation 1980] ***1980 Institute on Planning, Zoning, and Eminent Domain*** 177, 206.) He concludes:

> "A survey of the state law on this topic reveals an amorphous and irreconcilable body of decisions, each purporting to implement the constitutional protection against confiscation." (Kanner at 180.)

Professor Kanner's conclusion of chaos is borne out by the cases.

California (***Agins***) and Arizona (***Davis v. Pima County*** [Ariz. App. 1978] 590 P.2d 459) reject compensation as a remedy, opting for invalidation as the only solution.

By contrast, Ohio (***Village of Willoughby Hills v. Corrigan*** [Ohio 1972] 278 N.E.2d 658, *cert. den. sub nom.* ***Chongris v. Corrigan*** [1972] 409 U.S. 919), [18/] Georgia (***Clifton v. Berry*** [Ga. 1979] 259 S.E.2d 35), and Massachusetts ***Hamilton v. Conservation Comm'n*** [Mass. App. 1981] 425 N.E.2d 358) reject invalidation, holding that compensation is the sole remedy.

As might be expected, the analysis is not so simple as examining two sides of a coin. Rather, the states have created a spectrum of remedial decisions. Five states (Texas, Kansas, Washington, North Dakota and Colorado) have announced that either compensation or invalidation may be appropriate, depending on the circumstances. (***City of Austin v. Teague*** [Tex. 1978] 570 S.W.2d 389; ***Ventures in Property I v. City of Wichita*** [Kan. 1979] 594 P.2d 671; ***Brazil v. City of Auburn*** [Wash. App. 1979] 598 P.2d 1; ***Kraft v. Malone*** [N.D. 1981] 313 N.W.2d 758; ***Hermanson v. Board of County Comm'rs*** [Colo. App. 1979] 595 P.2d 694.)

Florida and New York seem not even internally consistent. Cases can be found acknowledging the availability of either compensation or invalidation (***Askew v. Gables-by-the-Sea*** [Fla. App. 1976] 333 So.2d 56; ***Moviematic Industries, Inc. v. Dade County*** [Fla. App. 1977] 349 So.2d 667; ***Fred F. French Investing Co. v. City of New York*** [1976] 39 N.Y.2d 587, 350 N.E.2d 381; ***Keystone Associates v. State*** [1978] 45 N.Y.2d 894, 383 N.E.2d 560), while others refuse to compensate for patently irreversible damage (***Mailman Dev. Corp v. Hollywood*** [Fla. App. 1973] 286 So.2d 614; ***Charles v. Diamond*** [1977] 41 N.Y.2d 318, 360 N.E.2d 1295).

New Hampshire has adopted the view expressed by Justice Brennan's opinion in ***San Diego G & E***, i.e., that damages be

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[18/] The comments of Justice Douglas, dissenting from the denial of certiorari, may bear note. He questions the unfettered use of the police power to achieve eminent domain goals, as well as the appropriate remedy for the aggrieved property owner.

awarded for a temporary taking until the state permits beneficial use (***Burrows v. City of Keene*** [N.H.1981] 432 A.2d 15).

This Court has consistently recognized the availability and preferability of compensation as a remedy (***Hurley v. Kincaid*** [1932] 285 U.S. 95; ***Dugan v. Rank*** [1963] 372 U.S. 609; ***Fresno v. California*** [1963] 372 U.S. 627; ***United States v. Gerlach Live Stock Co.*** [1950] 339 U.S. 725; ***Lake Country Estates v. Tahoe Regional Planning Agency*** [1979] 440 U.S. 391; ***Penn Central Transp Co. v. City of New York*** [1978] 438 U.S. 104; ***San Diego G & E.***)

It is time for synthesis. The vindication of federal constitutional rights cannot be left to such whimsical state court construction. To permit the present situation to remain without clear guidance from this Court is to deny due process, as well as equal protection, of law to all land use litigants.

THE INTENT OF PALMDALE AND THE COUNTY TO MAKE A GIFT OF THE SUBJECT PROPERTY TO THE AIR FORCE IS NOT ONLY RELEVANT, IT RENDERS THE GOVERNMENTAL ACTION UNCONSTITUTIONAL UNTIL COMPENSATION IS MADE.

With the backhand of a footnote (App A, p. 3, fn. 1), the Court of Appeal swept aside settled decisions of this Court which permit examination of the government's motive in passing legislation. By ignoring the governmental motive, the Court of Appeal examined only a part of this case, and disabled itself from examining the totality.

This Court recently stated the rule succinctly:

> "acts generally lawful may become unlawful when done to accomplish an unlawful end . . ." (***City of Richmond v. United States*** [1975] 422 U.S. 358, 379, quoting with approval.)

To determine whether acts are ". . . done to accomplish an unlawful end . . .", one may consider ***why*** the acts were done, as this Court did in ***Richmond. See, e.g.***:

Arlington Heights v. Metro. Dev. Corp. (1977) 429 U.S. 252, 265-268 [zoning action invalid if unconstitutionally motivated];

Reitman v. Mulkey (1967) 387 U.S. 369, 376, 381, [statute struck down because unconstitutionally motivated];

Progress Dev. Corp. v. Mitchell (7th Cir. 1961) 286 F.2d 222, 231 [damages under Civil Rights Act proper if plaintiffs can prove unconstitutional motive behind condemnation];

Seattle School Dist. No. 1 v. State of Wash. (9th Cir. 1980) 633 F.2d 1338, 1342, 1347 [statute struck down because unconstitutionally motivated]. 19/

That there are cases (*see, e.g.*, App A, p. 3, fn. 1) noting that courts need not be concerned with governmental motivation as a general rule, does not negate the rather large exception discussed above, i.e., a nominally permissible act may be unlawful if unconstitutionally motivated. Nor does the general rule require the judiciary to blind itself to impropriety where the impropriety can be proved. 20/

The complaints allege that the governmental motive was to take the subject property from the owners and curry favor with the Air Force 21/ by donating a clear zone. The questionable constitutionality of such a scheme merits investigation by trial.

19/ *See also Griffin v. School Board* (1964) 377 U.S. 218, 231, holding that even the concurrent existence of a proper basis for the action may not validate an unconstitutionally motivated act.

20/ Besides, even examining only what the government *did*, (rather than its motives) as the Court of Appeal prefers, what the government *did* was to take the owners' property and give it to the Air Force for a clear zone. And no one has paid the owners for this taking.

21/ The Air Force is the largest employer other than Lockheed in Northwest Los Angeles County.

CONCLUSION

This Court has clearly expressed its views on the importance of protecting private property rights:

> ". . . the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is, in truth a 'personal' right, whether the 'property' in question be a welfare check, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." (***Lynch v. Household Finance Corp.*** [1972] 405 U.S. 538, 552.)

Today private property rights are in jeopardy. The penchant of financially pressed municipalities to attempt to transmute private into public property, without compensation, is visible across the nation.

State courts, attempting to reconcile the needs of municipalities with the rights of private property owners have developed a chaotic body of law, while purporting to apply the same federal constitutional prohibition against confiscating private property.

There is anarchy in the determination of what constitutes a taking.

There is anarchy in the determination of what constitutes a constitutionally appropriate remedy.

California stands in open defiance of this Court's constitutional teachings.

This Court's guidance is sorely needed.

The Gillilands and Mrs. Fitz pray that probable jurisdiction be noted.

Respectfully submitted,
JERROLD A. FADEM
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Attorneys for the Appellants

Appendix

In the Court of Appeal of the State of California, Second Appellate District, Division One.

Robert J. Gilliland,
Plaintiff and Appellant,
vs.
The City of Palmdale, a municipal corporation,
Defendant and Respondent.

2d Civ. No. 59028,
Super. Ct. No. C107092.
Filed December 7, 1981.

APPEAL

APPEAL from judgment of the Superior Court of Los Angeles County. Thomas W. Le Sage, Judge. Affirmed.

Fadem, Berger & Norton, Michael M. Berger, for Appellant.

Kostas & Epson, James S. Kostas, for Respondent.

Plaintiff appeals from a judgment on the pleadings without leave to amend. Our review of such judgment is controlled by time-honored rules of law. A motion for judgment on the pleadings performs the function of a general demurrer (*Tiffany v. Sierra Sands Unified School Dist.* (1980) 103 Cal.App.3d 218, 222): it tests the sufficiency of the complaint to state a cause of action. (*Id.*, at pp. 224-225.) Like a demurrer it is confined to the face of the pleading under attack and admits all material and issuable facts pleaded. (*Id.*, at p. 225.) Accordingly, we shall assess the legal adequacy of the following facts drawn from plaintiff's complaint and accepted as true.

FACTUAL BACKGROUND

In 1965 plaintiff became the owner of five acres of vacant land in the defendant City of Palmdale (hereafter the property) which were located in the path of a takeoff and approach runway at Air Force Plant 42, a joint civilian-military airport. At the time that plaintiff acquired the property it was zoned "A-2." According to the Palmdale zoning ordinance, of which we take judicial notice (Evid. Code, § 452(b); ***Baillargeon v. Dept. of Water and Power*** (1977) 69 Cal.App.3d 670, 676), the classification A-2 was "established for use on land suited for agricultural purposes and other open land uses . . . [t]he basic intent of this Zone [is] to encourage and support the development of agricultural pursuits. To further this purpose limitations are imposed on incompatible and conflicting urban uses." (Ord. No. 140, ch. 3, art. 32, zone A-2, § 32.01). Permissible uses of the land thus zoned include: one-family dwellings; animal hospitals, schools and kennels and veterinary offices; youth camps and other camp grounds; crops; auction grounds; stock breeding and yards; riding academies and stables. The A-2 zoning category functioned as a holding zone, so-called, such that applications for a zone change from A-2 were subject to particularly careful and detailed scrutiny in respect of the uses that would occur under the change.

In January 1973 plaintiff applied to the Palmdale Planning Commission for a zone change to a "commercial planned development" zone. On January 19, 1973, the Planning Commission voted five to zero in favor of plaintiff's requested zone change. On May 11, 1973, plaintiff's request was heard before the Palmdale City Council. A representative of Air Force Plant 42 and a representative of the civilian contractors at Air Force Plant 42 testified in opposition to plaintiff's requested zone change. The City

Council voted three to one against plaintiff's requested zone change based on the proximity of the property to runways at Air Force Plant 42. As a result of the City's refusal to rezone his property as requested, plaintiff suffered damages of more than $325,000.

On April 15, 1975, plaintiff filed in superior court an "amended complaint for inverse condemnation," alleging all the above facts which we accept as true for purposes of reviewing the judgment. Plaintiff further alleged that his private property had "been unlawfully taken and damaged for public use without just compensation and without due process and equal protection of the laws to which [he was] entitled by the United States and California Constitutions." The complaint contained additional conclusionary allegations which we discount as surplusage. [1/]

[1/] Paragraphs 13, 15 and 16 alleged, *inter alia*, that the refusal was for the purpose of devoting the property to public use as a clear zone; that plaintiff had been deprived of the beneficial and only economically feasible use of his property; that the City intended a *de facto* transformation of the property into public property without paying just compensation. We discount the allegations of motive implicit in these paragraphs on the further ground that ". . . the purpose or motive of the city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance. . . . If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence.' (Citation.)" (***Pinheiro v. County of Marin*** (1976) 60 Cal.App.3d 323, 327-328.) Similarly, under federal law, motive is irrelevant. "'. . . the Constitution measures a taking of property not by what a State says, or . . . intends, but by what it does.' (Citations.)" (***San Diego Gas and Electric Co. v. San Diego*** (1981) ____ U.S. ____, [67 L.Ed.2d 551, 573] (dis. opn. Brennan, J.).) Thus, even if we accepted these allegations of motive as true, they would not bear on our determination of whether the challenged regulation "took" plaintiff's land.

(***Agins v. City of Tiburon*** (1979) 24 Cal.3d 266, fn.2 (dis. opn. Clark, J.); ***Hecton v. People ex. rel Dept. of Transportation*** (1976) 58 Cal.App.3d 653, 657; ***6th Camden Corp. v. Evesham Tp., Burlington Cty.*** (D. N.J. 1976) 420 F.Supp. 709, 720.)

On March 14, 1979, the California Supreme Court decided ***Agins v. City of Tiburon, supra***, 24 Cal.3d 266, and held that the remedy of inverse condemnation was not available to a landowner aggrieved by the negative impact of a zoning regulation on his property rights. Such a plaintiff was limited, the court held, to mandamus or declaratory relief to redress the government's excessive exercise of its police power to regulate land use. On the plaintiff's action for declaratory relief, the court held as a matter of law that no taking of plaintiff's land had occurred through enactment of the zoning regulation in question. (*Id.*, at pp. 277-278.)

On July 17 and 18, 1979, the motion of defendant City of Palmdale for judgment on the pleadings was argued in the trial court. On July 18, 1979, the court granted defendant's motion, noting in its minute order, "The Court, having reviewed and considered the pleadings and outline of the evidence as presented by counsel for the plaintiff, finds that there has been no taking or damaging of property." 2/

2/ The trial court's consideration of the "outline of evidence as presented by counsel for the plaintiff" was obviously impermissible when deciding the motion for judgment on the pleadings, as the motion is directed to the face of the pleading. (4 Witkin, Cal. Procedure (2d ed. 1971) p. 2817.) On review we limit ourselves to examination of the face of the pleading and affirm if the trial court was correct within that proper focus. (***Cf. Friendly Village Community Assn. Inc. v. Silva & Hill Constr. Co.*** (1973) 31 Cal.App.3d 220, 224.) No doubt the trial court's consideration of the outline of (continued)

On June 10, 1980, the United States Supreme Court decided the appeal of ***Agins, supra***, from the California Supreme Court and affirmed the holding that the zoning regulation in question did not take the plaintiffs' property without just compensation. (***Agins v. Tiburon*** (1980) 447 U.S. 255.) But because no taking had occurred the court did "not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation." (*Id.*, at p. 263.)

On June 25, 1981, plaintiff filed his opening brief in this court, announcing in his introduction, "This case seeks enforcement of rights under the U.S. Constitution (Fourteenth Amendment) and the federal Civil Rights Act (42 U.S.C. § 1983)."

DISCUSSION OF THE LAW

Notwithstanding plaintiff filed this case six and a half years ago as a complaint for inverse condemnation, his characterization of the action on appeal is accurate. The complaint invokes plaintiff's rights under the United States Constitution and specifically alludes to rights protected by the Fifth and Fourteenth Amendments thereto. All that is required to bring a claim under the federal Civil Riqhts Act (42 U.S.C. § 1983) is an allegation that one has been subjected by any form of state action to the deprivation of any right secured by the Constitution of the United States, [3]

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[2] (continued) evidence pertained to its decision whether to grant leave to amend, whether plaintiff could cure by amendment the defects on which the motion would be granted.

[3] 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any (continued)

(***Gomez v. Toledo*** (1980) 446 U.S. 635, 640.) There is no want of federal civil rights cases in which the gravamen of the claim is a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments, such as plaintiff has asserted. (*See, e.g.*, ***Hernandez v. City of Lafayette*** (5th Cir. 1981) 643 F.2d 1188; ***Gorman Towers, Inc. v. Bogoslavsky*** (8th Cir. 1980) 626 F.2d 607; ***Barbaccia v. County of Santa Clara*** (N.D. Cal. 1978) 451 F.Supp. 260; ***Dahl v. City of Palo Alto*** (N.D. Cal. 1974) 372 F.Supp. 647.) An action under the federal Civil Rights Act can be brought in state court (***Martinez v. California*** (1980) 444 U.S. 277; ***Williams v. Horvath*** (1976) 16 Cal.3d 834, 837; ***Brown v. Pitchess*** (1975) 13 Cal.3d 518, 520-523), and can be brought against a municipality (***Monell v. Department of Social Services*** (1978) 436 U.S. 658, 690.) Altogether we perceive no obstacle to treating this case on appeal as such an action.

When a federal civil rights action, or other federally created cause of action, is brought in state court, the vindication of that right cannot be frustrated by state law. (***Williams v. Horvath, supra***, 16 Cal.3d at 841.) In matters of substance the law of the jurisdiction creating the right will control; in other words, federal substantive case law should be applied. (***Cf. Central Vermont Railway Co. v. White*** (1915) 238 U.S. 507, 511.)

Thus, the chief benefit of viewing his complaint in a civil rights perspective is avoidance of the devastating effect of the California Supreme Court holding in ***Agins v. City of***

3/ (continued) citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress."

Tiburon, supra, 24 Cal.3d 266. Following ***Agins*** the remedy of inverse condemnation with its imposition of money damages no longer exists in California law. (*Id.*, at p. 272.) A zoning regulation, no matter how unreasonable or severe its impact on a landowner's property rights, can never effect a "taking" within the meaning of the Just Compensation Clause of either the United States or California Constitutions. It must be regarded as an excessive exercise of the police power from which the injured landowner must seek relief by mandamus or declaratory action to have it set aside. (*Ibid.*)

California's position flatly contradicts clear precedent of United States Supreme Court cases. Although the United States Supreme Court since the California ***Agins*** has twice on a procedural or technical basis declined to reach the issue and resolve the conflict (***Agins v. Tiburon, supra***, 447 U.S. 255 and ***San Diego Gas and Electric Co. v. San Diego***, (1981) __ U.S. __ [67 L.Ed.2d 551]), Justice Brennan in his dissenting opinion in ***San Diego Gas and Electric***, joined by three members of the Court, has thoroughly analyzed it. Reviewing the United States Supreme Court cases on inverse condemnation, he points out that the Supreme Court regularly hears cases to settle on the particular facts whether a taking that triggers payment of just compensation has been effected by an exercise of the police power through a zoning ordinance or other land use restriction. (*Id.*, at pp. 572-573.) The court thus clearly assumes such a possibility. (*See, e.g.* ***Penn Central Transportation Co. v. New York City*** (1978) 438 U.S. 104; ***Goldblatt v. Town of Hempstead*** (1962) 369 U.S. 590.) Dicta abound in these cases on the standards by which such a determination should be made. In ***Agins, supra***, 447 U.S. at 260-261, for instance, the court stated, "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138, n. 36 (1978). The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, see *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) the question necessarily requires a weighing of private and public interests."

While Justice Brennan's conclusion — that government action in the form of a police power regulation can effect a taking just as surely as eminent domain, and the Constitution demands then that just compensation be paid — awaits another vote before it invalidates the California Supreme Court holding of *Agins, supra*, there is no question that the federal law accepts in theory the remedy of inverse condemnation with its imposition of money damages for a "taking" effected through a zoning regulation. Plaintiff herein, therefore, is not out of court on a judgment on the pleadings for the reason that the remedy he seeks has been abolished in state law.

While plaintiff's suit remains viable under the Civil Rights Act as to the remedy it seeks, it is no less susceptible as a civil rights action to judgment on the pleadings for failure to state a cause of action, or as it is termed in federal parlance, "a claim upon which relief can be granted." (Fed. Rules Civ. Proc., rule 12(b)(6), 28 U.S.C.) Contrary to plaintiff's interpretation of the trial court's ruling as reflected in his brief arguing for application of federal law, the wording of the judgment below indicates the trial court granted the motion because the facts alleged failed to show any "taking," not because it failed to apply federal law. It is immaterial of course on what grounds the trial court granted judgment on the pleadings if that was the correct decision. (***Apelian v. County of Los Angeles*** (1968) 266 Cal.App.2d 550, 554, disapproved on another point in ***Sullivan v. County of Los Angeles*** (1974) 12 Cal.3d 710, 722.) We think it was.

We acknowledge and apply the federal policy that a civil rights pleading should be liberally construed; that ". . . a § 1983 complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. (Citation.)" (***Shaw v. Briscoe*** (5th Cir. 1976) 541 F.2d 489, 490, *cert. den.* 430 U.S. 933.) We acknowledge and are willing to apply, if this were an appropriate case, the wisdom of federal "taking" cases according to which there is no "set formula to determine where regulation ends and taking begins" (***Goldblatt v. Town of Hempstead, supra***, 369 U.S. 590, 594); and the determination is one of reasonableness that entails "ad hoc, factual inquiries" (***Penn Central Transportation Co. v. New York City, supra***, 438 U.S. 104, 124), resolution of which is inappropriate on a motion to dismiss. (***M.J. Brock & Sons, Inc. v. City of Davis***, (N.D. Cal. 1975) 401 F.Supp. 354, 358; ***Dahl v. City of Palo Alto***, (N.D. Cal. 1974) 372 F.Supp. 647, 648.) Even so, plaintiff's facts, construed as liberally as possible, indeed taken as true, when evaluated by the standards that the federal cases have evolved, beyond doubt could not make out a "taking" and do not warrant a trial on the merits.

The crucial features of plaintiff's situation are that both at the time that he acquired the property and at the time that he brought the lawsuit, the property was both located in the path of the Air Force runway and zoned A-2. The only intervening government action was the City's refusal to rezone on plaintiff's request to enable him to develop the property for commercial use. If, as plaintiff interprets the situation, the City, by permitting only low density agricultural use of the property, in effect has devoted the property to the use of the Air Force or to the public as a clear zone at the end of the Air Force runway, then it had already done so when he acquired the property. The City by refusing to rezone has not deprived him of any property interest that he ever had. Rather, in a more accurate perspective, the City has refused to give him a greater property interest than he acquired.

Plaintiff's claim of a government taking under these circumstances is uniquely slim, as far as we can tell from the cases. The more familiar fact situation, in which a motion for judgment on the pleadings or to dismiss has been denied, presents the affirmative enactment of a zoning change or the adoption of a general plan by the government entity which limits the plaintiff's economic exploitation of the property affected. (*See, e.g., Sanfilippo v. City of Santa Cruz* (N.D. Cal. 1976) 415 F.Supp. 1340 [motion to dismiss denied when plaintiffs alleged that zoning of their land was changed from a residential classification permitting one residence per 2.5 acres to a category permitting one residence per 100 acres and plaintiffs' subsequent application for rezoning and approval of a planned unit development was denied]; *M.J. Brock & Sons v. City of Davis, supra*, 401 F.Supp. 354 [motion to dismiss denied when plaintiff pleaded misleading and encouraging actions by defendants regarding plaintiff's development plans followed by a downzoning from high density residential to agricultural to a total ban on construction].)

In the few cases where the nature of the alleged "taking" has been the refusal to rezone land that remained zoned as it was when plaintiff acquired it, such as plaintiff has asserted herein, there were additional circumstances before the court that justified not disposing of the case without trial. In ***6th Camden Corp. v. Evesham Tp., Burlington Cty., supra***, 420 F.Supp. 709, plaintiff acquired 20 acres, 17.9 of which were zoned for business and 2.1 of which, landlocked with the 17.9, were zoned residential. Plaintiff planned to construct a shopping center on the entire acreage, but defendants refused to rezone the 2.1. Plaintiff claimed the 2.1 had been rendered useless and unconstitutionally "taken" by the zoning for residential use. The court denied a motion to dismiss, even though aware that a mere diminution in value would not prove a "taking." The court took judicial notice of a state court opinion that the 2.1 acres could not feasibly be used for the permitted use. Similarly in ***Hernandez v. City of Lafayette, supra***, 643 F.2d 1188, plaintiff's land had been zoned single family residential for ten years when he requested rezoning to a business or multi-family residential use. The Court of Appeals, reversing a summary judgment erroneously granted on the defendants' claim of immunity, noted that there were genuine issues of material fact whether the refusal to rezone constituted a taking because of summary judgment evidence that the land was not feasible for the use permitted (adjacent to sewage treatment, flood plain extending across parts of it) and because of questions of good faith in defendants' processing of plaintiff's rezoning application. (*Id.*, at p. 1200.)

In the instant case there is no allegation that plaintiff's land is not suited to the uses which are permitted, nor any allegation of governmental action beyond the straightforward adherence to the agricultural zoning which came with the property. When this modest governmental action, which has deprived plaintiff if not of his property at least of his profit in the amount of $325,000, is measured against the criteria of a "taking" enunciated by the Supreme Court and that applied by the lower federal courts, it appears " 'to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.' [Citations]." (*6th Camden Corp. v. Evesham Tp., Burlington Cty., supra*, 420 F.Supp. 709, 720, emphasis omitted.)

The criteria are two: ". . . if the ordinance does not substantially advance legitimate state interests, [citation] or denies an owner economically viable use of his land [citation]." (*Agins v. Tiburon, supra*, 447 U.S. 255, 260.) It is plaintiff's burden to prove that the ordinance meets these criteria if a "taking" by the ordinance is to be found. This is a heavy burden in view of the presumption of validity that attaches to the exercise of the public zoning authorities. (*See Burns v. City of Des Peres* (8th Cir. 1976) 534 F.2d 103, 108, *cert. den.* 429 U.S. 861.)

The interests of the City of Palmdale in the health and welfare of its citizens would appear to be well served by maintaining open land and low density agricultural land uses in the entire vicinity of the airport and especially in the direct path of the planes' takeoff and approach where plaintiff's property is situated. There being no allegations by plaintiff to the contrary, we find the A-2 zoning of plaintiff's land to be a reasonable exercise of the police power to protect the community from the excessive noise, air pollution and abcve average safety hazards that attend the concentration of air traffic in the zoned area.

Plaintiff claims that the refusal to rezone his land for commercial development denies him the "beneficial" and "only economically feasible" use of his land. The legal question, however, is whether it denies him "economically viable use" (*Agins, supra*, 447 U.S. 255, 260) within the meaning of that concept as developed in the federal cases.

It is well established that a mere "diminution in value" does not amount to such a denial. (***Goldblatt v. Town of Hempstead, supra***, 369 U.S. 590, 594; ***Hadacheck v. Sebastian*** (1915) 239 U.S. 394, 408-409 [diminution from $800,000 to $60,000 upheld].) Moreover, ". . . the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough. . . ." (***United States v. Central Eureka Mining Co.*** (1958) 357 U.S. 155, 168.) Indeed, "[f]or there to be a taking the landowner must show he has been deprived of all reasonable uses of his land" (***C.F. Lytle Co. v. Clark*** (10th Cir. 1974) 491 F.2d 834, 838); that it has been rendered valueless. (***Steel Hill Development, Inc. v. Town of Sanbornton*** (lst Cir. 1972) 469 F.2d 956, 963, *cert. den.* 414 U.S. 932.)

Whatever conclusions plaintiff may have alleged in his complaint, he has not alleged facts that show that the A-2 zoning denies him all reasonable or "economically viable" uses, as did the plaintiff in ***Hernandez v. City of Lafayette, supra***, 643 F.2d 1188; he has not alleged that the land is not suited to the uses for which it is zoned. The ordinance permits any number of uses, such as crops, livestock, animal facilities, which are not only reasonable but valuable and essential to a healthy, diversified community economy.

As analyzed by the standards of the federal "taking" cases, the A-2 zoning of plaintiff's land does not deprive him of the property rights protected in the Fifth and Fourteenth Amendments to the United States Constitution. No set of facts that plaintiff could prove would entitle him to relief under the federal Civil Rights Act.

The judgment on the pleadings without leave to amend is affirmed.

NOT FOR PUBLICATION.

JAKES, J.*

We concur:

SPENCER, P. J.
DALSIMER, J.

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* Assigned by the Chairperson of the Judicial Council.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

Robert J. Gilliland,
Plaintiff and Appellant,

vs.

The City of Palmdale, a municipal corporation,
Defendant and Respondent.

2d Civ No. 59028,
Super Ct. No. C107092.
Filed January 6, 1982.

ORDER

THE COURT: The unpublished opinion in this case having been filed on December 7, 1981, and request for certification for publication having been made,

IT IS HEREBY CERTIFIED that the opinion meets the standards for publication specified in subdivision (b) of rule 976 of the California Rules of Court; and

ORDERED that the words "NOT TO BE PUBLISHED" appearing on page 1 of said opinion be deleted, and the opinion herein be published in the Official Records.

GILLILAND vs. CITY OF PALMDALE

Los Angeles, California,
January 6, 1982,
No. 59028.

THE COURT:

Petition for Rehearing Denied.

In the Court of Appeal of the State of California, Second Appellate District, Division One.

Frank M. Gilliland, Jr., et al.,
Plaintiffs and Appellants,
v.
County of Los Angeles,
Defendant and Respondent.

2 Civ. No. 60960
(Super. Ct. No. C 107093).
Filed November 25, 1981.

APPEAL

APPEAL from a judgment of the Superior Court of Los Angeles County. Alexander R. Early III, Judge. Affirmed.

Fadem, Berger & Norton and Michael M. Berger for Plaintiffs and Appellants.

John H. Larson, County Counsel, and Paul T. Hanson, Deputy County Counsel, for Defendant and Respondent.

Plaintiffs Frank, James and Robert Gilliland appeal an order of dismissal entered after the trial court sustained without leave the general demurrer of defendant County of Los Angeles (hereinafter referred to as County) to their first amended complaint.

FACTS

The facts alleged by plaintiffs in their first amended complaint for inverse condemnation (with a prayer for declaratory relief and injunction) must on this appeal be taken as true. Plaintiffs in their first amended complaint filed September 26, 1979, allege, in substance, as follows:

That the Gillilands are and for seven years have been owners of Lots 41, 60 and 61 of Tract 7670 of Los Angeles County comprising 30 acres of vacant land; that the subject property being situated in unincorporated county territory is within the zoning and planning jurisdiction of the County; that the property is and at all times relevant has been zoned A2-5, an agricultural zone which permits two single family residences for each five acres of land; that A2-5 is used by the County as a "holding zone" in which the County holds the land to the minimal use permitted by the zoning by withholding zone changes for a proposed new use when the owner comes to the County for a permit to put his land to its highest and best use "unless the County approves the specific proposed land use, site utilization and sometimes aesthetics of the proposed use to be made of the land"; that real property taxes of the subject property from the time of its purchase in 1967 through the 1972-1973 tax year increased 600 percent due to increased commercial and industrial development in the surrounding area; and that as a further result of this development the Gillilands on request granted easements and dedicated portions of the subject property for purposes such as street widening, curbing and utilities.

Plaintiffs allege further that in February 1973 they applied to the County Regional Planning Commission for a zoning change of the subject property to CPD, a commercial planned development zone; that this request was on

February 20, 1973, denied on the stated grounds that the property lies within the primary impact area of the proposed Palmdale Intercontinental Airport and that plaintiffs did not adequately demonstrate need for additional commercial zoning in the area; that the Gillilands appealed this decision to the County Board of Supervisors (hereinafter the Board); that on April 30, 1973, the Board heard testimony opposing the requested zone change from representatives of Air Force Plant 42 and from aircraft companies with facilities in the adjacent area, namely Lockheed, McDonnell Douglas, Rockwell International, and Northrop; that Air Force Plant 42 is an airport on which commercial manufacturing is conducted including assembly of Lockheed L 1011; and that the Board denied the Gillilands' request for a zone change based on testimony that the property is within an area that receives noise of 100 db(A) or more from Air Force Plant 42.

Plaintiffs in addition allege that by reason of the County's refusal to rezone, the Gillilands' private property has been unlawfully taken for public use without just compensation and without due process and equal protection of law under the federal and state Constitutions; that as the result of the refusal to permit commercial use the Gillialnds were deprived of beneficial use, e.g., the use, enjoyment and right to develop and sell the subject property; that plaintiffs are informed and believe that the acts of the County were intended to stultify the lawful use of the Gillilands' land, to reduce its value and to render it unsaleable and unusable for any reasonable private use and to accomplish a de facto transformation of the subject land into public property without payment of just compensation; that the conduct of the County was unreasonable, unlawful, arbitrary and discriminatory; that the Gillilands have been damaged thereby in amount in excess of

$825,000; that prior to filing this action the plaintiffs filed a claim with the County which was rejected.

Plaintiffs allege further that the County took the plaintiffs' property to provide space for the approach and departure of jet aircraft to and from Air Force Plant 42; that this impressed the land with a servitude for airport use in furtherance of the County's determination of its own best interest in keeping Air Force Plant 42 operating in the County; that the County "took the use of the Gilliland's property by the agreement between the County and the U.S." and placed the use of the Gillilands' property in the United States; that by reason of the foregoing the County's zoning ordinance is invalid as applied to the Gillilands' property; that plaintiffs have no adequate remedy at law because of ***Agins v. City of Torrance*** [sic] (1979) 23 Cal.3d 605; and that plaintiffs were deprived of their property without just compensation or due process of law in violation of the Fifth and Fourteenth Amendments to the United States Constitution and the Federal Civil Rights Act (42 U.S.C. § 1983).

Plaintiffs on the basis of these allegations sought just compensation for the taking, damages under the Federal Civil Rights Act, declaratory judgment and injunctive relief invalidating the County's zoning ordinance as applied to the subject property and costs and expenses of litigation including attorneys' fees. Defendant County filed a general demurrer which was sustained by the trial court and plaintiffs have appealed.

ISSUE

Plaintiffs on appeal contend that the trial court erred in failing to apply applicable federal law and therefore sustaining the demurrer and dismissing their action.

DISCUSSION

The Gillilands contend that the trial court disregarded the legal authority of federal cases when it sustained the County's demurrer. It is well established that enactment of any general measure which purports to zone or rezone property is a legislative act. (***Arnel Development Co. v. City of Costa Mesa*** (1980) 28 Cal.3d 511, 516; ***San Diego Bldg. Contractors Assn. v. City Council*** (1974) 13 Cal.3d 205.) The application of this principle has been held, in the case of a rezoning, not to constitute a denial of due process under the United States and California Constitutions. (***Arnel Development Co. v. City of Costa Mesa, supra***, 28 Cal.3d at p. 519.) California views zoning ordinances as legislative while variances and subdivision map approvals are adjudicative. Therefore, adequate protection under state and federal constitutional requirements is fulfilled when zoning is enacted by the city council by the provisions for the landowner to have notice and hearing. When zoning is enacted by initiative, these requirements are fulfilled by the equal opportunities of those favoring and opposing the zoning to•be heard by the electorate. Those affected by the zoning or rezoning also enjoy the option to obtain administrative or judicial relief in the event the zoning restriction produces arbitrary or capricious results.

In the event hardship is occasioned by zoning restrictions administrative relief is potentially available. (***Id.***, at p. 520). The landowner has "[t]he right to seek judicial invalidation of zoning which is arbitrary or unreasonable (***see Hamer v. Town of Ross*** (1963) 59 Cal.2d 776, 781 [. . .]), which bears no reasonable relationship to the regional welfare (see ***Associated Home Builders etc., Inc. v. City of Livermore, supra***, 18 Cal.3d 582, 609-610), or which deprives them of substantially all use of their land (***see Agins v. City of***

Tiburon (1979) 24 Cal.3d 266, 273 [. . .], *affd.* (1980) ____ U.S. ____ [65 L.Ed.2d 106, . . .]). . . ." (***Arnel Development Co. v. City of Costa Mesa, supra***, 28 Cal.3d at p. 521.)

Nonetheless zoning regulations have traditionally been sustained against constitutional attacks. (*See, e.g.*, ***Euclid v. Ambler*** (1926) 272 U.S. 365, 386.) The California Supreme Court has previously held that inverse condemnation does not lie in zoning actions in which it is alleged that the market value of property is reduced. (*See* ***HFH, Ltd. v. Superior Court*** (1975) 15 Cal.3d 508.)

Therefore, the enactment by a city of a zoning ordinance reducing the density of approved development on an owner's land, does not constitute a taking without just compensation in violation of the Fifth and Fourteenth Amendments which would support an action in inverse condemnation. (***Agins v. Tiburon*** (1980) 447 U.S. 255.) The United States Supreme Court in ***Agins*** affirmed the holding of the California Supreme Court that the zoning ordinance on its face did not constitute a taking without just compensation (***Agins v. City of Tiburon*** (1979) 24 Cal.3d 266). The California decision in ***Agins*** held that a landowner who challenges the constitutionality of an ordinance may not sue in inverse condemnation and thereby transmute an excessive use of the police power into a lawful taking for which compensation in eminent domain is required. (See also the discussion relative to monetary compensation in ***San Diego Gas & Electric Co. v. San Diego*** (Mar. 24, 1981)* ____ U.S. ____.)

In the case at bench, just as in ***Agins***, the zoning ordinance does not on its face take plaintiffs' property without just compensation. The Gillilands do not allege that the ordinance on its face deprives them of subtantially all use of the land. It is clear from a reading of the ordinance describing A2-5 zoning that there are many uses to which the land may be put in addition to residential use.

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* Advance Report Citation: 49 U.S.L.Week 4317.

The specific zoning regulations here at issue constitute exercise of the city's police power to protect local residents from the adverse effects of urbanization in specifying low density where the noise level is high. (*See, e.g., Agins v. Tiburon, supra*, 447 U.S. 255, 261.) Although this is the result of the proximity of the airport, this exercise of the police power does not constitute a taking compensable in damages.

In any event, in California the remedy of inverse condemnation is not available in these circumstances and declaratory relief or mandamus is the sole means of relief. We note that here, just as in *Agins*, the Gillilands do not allege that they have submitted to the County a plan to use or to improve their property according to the manner permitted by zoning regulations; or that such a plan has been rejected. Consequently, there is as yet apparently no circumstance which has generated a concrete controversy regarding the application of the specific zoning provisions. (*Agins v. Tiburon, supra*, 447 U.S. at p. 260.) In view of this circumstance, there is no ground for declaratory relief.

By a parity of logic, mandamus has not been effectively pleaded by the Gillilands since they allege that they sought a zone change rather than a building permit or variance or conditional use permit. Since zoning, as we have pointed out, is a legislative act, mandamus is not an appropriate remedy in the case at bench. (*Toso v. City of Santa Barbara* (1980) 101 Cal.App.3d 934, 942; *City Council of Santa Barbara v. Superior Court* (1960) 179 Cal.App.2d 389, 396-399.)

Finally, since the ordinance is constitutional on its face and there is no allegation of a threatened harmful act by the County, the complaint does not allege facts which would support an injunction.

The Gillilands in their brief concede that they have no remedy at law under these circumstances by virtue of the legal principles enumerated in *Agins* which limit their remedies. They have, therefore, sought to set forth a claim for damages under the federal Civil Rights Act (42 U.S.C. § 1983). That statute, in substance, merely establishes that a remedy is available when any person, under color of state law, deprives the complaining party of rights, privileges, or immunities secured by federal law. The right to just compensation for a governmental taking of private property arises not from the federal Civil Rights Act but from the protections of the Fifth and Fourteenth Amendments. However, the California Supreme Court in *Agins* held that monetary damages constituted an inappropriate remedy for an alleged taking which was the result of local land-use regulation expressing concern with the chilling effect such awards might have on the proper exercise of the police power (*Agins v. City of Tiburon, supra*, 24 Cal.3d 266, 276-277.) In view of that decision, the remedy of monetary damages would be unavailable in any event, whether the action were brought in inverse condemnation or under the federal Civil Rights Act. Since it does not appear that there was any taking in this case, the distinction is immaterial.

Ultimately, the Gillilands fail to allege facts which constitute an actual taking of property. An owner of undeveloped land, such as the acreage in the case at bench, has no vested right in existing zoning. (*Avco Community Developers, Inc. v. South Coast Regional Co.* (1976) 17 Cal.3d 785, 791.) A fortiori, the owner can have no vested right in more valuable zoning which he may have anticipated in the future and which would be different from that in effect at the time he became the owner. (***HFH, Ltd. v. Superior Court, supra***, 15 Cal.3d 508, 516.) There is furthermore, no right to have real property zoned for its highest and best use. (***Ibid.***) The allegations that representatives of the U.S. Air Force and aircraft companies with facilities in the adjacent area testified opposing the requested zone change contributes nothing with respect to the causes of action the Gillilands attempt to state since neighboring landowners are entitled to present their views at a hearing on rezoning. (See ***N.B.H. Land Co. v. United States*** (Ct. Cl. 1978) 576 F.2d 317, 318-319.)

In summary, the Gillilands essentially allege that their property would have a higher monetary value if it were rezoned commercial. Such circumstances are insufficient to support a cause of action for a zoning change. (***Village of Euclid v. Ambler Realty Co.*** (1926) 272 U.S. 365, 384-385.)

DISPOSITION

The judgment (order of dismissal) is affirmed.

HANSON (Thaxton), J.

We concur:

SPENCER, P.J.
LILLIE, J.

NOT TO BE PUBLISHED

In the Court of Appeal of the State of California, Second Appellate District, Division One.

Frank M. Gilliland, Jr., et al.,
Plaintiffs and Appellants,
vs.
County of Los Angeles,
Defendant and Respondent.

2 Civ. No. 60960,
Super. Ct. No.107093
Filed December 10, 1981.

ORDER MODIFYING OPINION
CERTIFICATION FOR PUBLICATION

THE COURT: It is ordered that the opinion filed herein on November 25, 1981, be modified in the following particular: At the end of the fifth line on page 9, add as footnote 1, the following:

> Sections 120.18, 233.6, 242, 242.2, 242.3, 261.9 and 262 of the zoning ordinances of Los Angeles County, Ordinance No. 1494, were attached as Exhibits 1 and 2 to County's brief on appeal. Deputy County Counsel's written motion for this court to take judicial notice of the foregoing sections under California Evidence Code section 452, subdivision (b), was granted in open court during oral argument on November 24, 1981.

The opinion in the above entitled matter filed on November 25, 1981, was not certified for publication in the Official Reports.

For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

GILLILAND vs. COUNTY OF L.A.

Los Angeles, California,
December 17, 1981,
No. 60960.

Petition for Rehearing Denied.

In the
Supreme Court of the
State of California,
En Bank.

Gilliland
vs.
The City of Palmdale, etc.,

2d District,
Division 1,
Civil No. 59028.

ORDER DENYING HEARING AFTER JUDGMENT BY THE COURT OF APPEAL

Filed February 10, 1982.

Appellant's petition for hearing DENIED.

The Reporter of Decisions is directed not to publish in the Official Reports the opinion in the above entitled cause filed December 7, 1981 and appearing at 127 Cal.App.3d 336. (Cal. Const., Art., VI, section 14; Rule 976, Cal. Rules of Court.) Bird, C.J., is of the view that the opinion should remain published.

CLERK'S OFFICE, SUPREME COURT
4250 State Building
SAN FRANCISCO, CALIFORNIA 94102
Feb 10, 1982

I have this day filed Order

HEARING DENIED

In re: 2 Civ. No. 60960 Frank M. Gilliland, Jr. vs. County of Los Angeles

Respectfully,
Clerk

In the Superior Court of the State of California for the County of Los Angeles.

Robert J. Gilliland,

Plaintiff,

vs.

The City of Palmdale,

Defendant.

Case No. C 107 092.
Filed September 12, 1979.

JUDGMENT ON THE PLEADINGS

The motion of Defendant for a judgment on the pleadings came on regularly for hearing on July 18, 1979. Jerrold A. Fadem appeared as counsel for Plaintiff, and A. Donald Long appeared as counsel for Defendant. After said hearing a minute order was entered granting said motion without leave to amend. The Court having reviewed and considered the pleadings and outline of evidence as presented by counsel for Plaintiff, rules that there has been no taking or damaging of Plaintiff's property.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing and that Defendant not recover its costs herein.

Dated: Sept. 12, 1979

/S/ Thomas W. LeSage
Judge of the Superior Court

In the Superior Court of California, County of Los Angeles.

Frank M. Gilliland, Jr., et al,
Plaintiffs,
vs.
County of Los Angeles, et al.,
Defendants.

Case No. C-107093.
Filed November 8, 1979.

ORDER OF DISMISSAL OF FIRST AMENDED COMPLAINT

Good cause appearing therefor, the above entitled action is hereby dismissed under the provisions of Section 583-c of the Code of Civil Procedure as to the First Amended Complaint.

Dated: Nov. 8, 1979

/S/ A. E. Early
Judge

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

2nd Civil No. 59028
Filed March 5, 1982

ROBERT J. GILLILAND,
Plaintiff and APPELLANT,
vs.
THE CITY OF PALMDALE, a municipal corporation,
Defendant and RESPONDENT.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Appeal From Superior Court of Los Angeles County
Hon. Thomas W. LeSage

Notice is hereby given that Appellant Robert Gilliland hereby appeals to the Supreme Court of the United States from the decision of the California Court of Appeal entered in this action on December 7, 1981 and as to which the California Supreme Court denied hearing on February 10, 1982.

This appeal is taken pursuant to 28 USC §1257(2).

FADEM, BERGER & NORTON
MICHAEL M. BERGER
Attorneys for Appellant

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid. I am over the age of 18 years and not a party to the above entitled action; my business address is 501 Santa Monica Boulevard, Santa Monica, California.

On March 5, 1982 I served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Monica, California addressed as follows:

James S. Kostas
Kostas & Epson
44540 North 10th Street
Lancaster, CA 93534

Clerk, California Supreme Court
4250 State Building
455 Golden Gate Avenue
San Francisco, CA 91401

Superior Court for the County of Los Angeles
For the Hon. Alexander Early, III
111 North Hill Street
Los Angeles, CA 90012

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 5th day of March 1982 at Santa Monica, California.

JACQUELYNN TOLLEFSON

IN THE COURT OF APPEAL
SECOND APPELLATE DISTRICT
STATE OF CALIFORNIA

2nd. Civil No. 60960
Filed March 5, 1982

FRANK M. GILLILAND, JR., et al.,
Plaintiffs and APPELLANTS,
vs.
COUNTY OF LOS ANGELES,
Defendants and RESPONDENTS.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Appellants Frank M. Gilliland, et al. hereby appeal to the Supreme Court of the United States from the decision of the California Court of Appeal entered in this action on November 25, 1981 and as to which the California Supreme Court denied hearing on February 10, 1982.

This appeal is taken pursuant to 28 USC §1257(2).

FADEM, BERGER & NORTON
MICHAEL M. BERGER
Attorneys for Appellants

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a citizen of the United States and a resident of the county aforesaid. I am over the age of 18 years and not a party to the above entitled action; my business address is 501 Santa Monica Boulevard, Santa Monica, California.

On March 5, 1982 I served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES on the interested parties in said action by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid in the United States mail at Santa Monica, California addressed as follows:

John H. Larson, County Counsel
Paul T. Hanson, Deputy County Counsel
648 Hall of Administration
500 West Temple Street
Los Angeles, CA 90012

Superior Court for the County of Los Angeles
For the Hon. Alexander Early, III
111 North Hill Street
Los Angeles, CA 90012

Clerk: California Supreme Court
4250 State Building
455 Golden Gate Avenue
San Francisco, CA 91401

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 5th day of March 1982 at Santa Monica, California.

JACQUELYNN TOLLEFSON

Section 32.02 Principal Uses Permitted

Premises in Zone A-2 may be used for:

A. The following principal uses provided that all buildings or structures shall be located not less than fifty (50) feet from any street, highway or any building used for human habitation:

   1. Animal hospitals.
   2. Animal raising, including such animals as poultry, fowl, birds, rabbits, chinchilla, nutria, mice, frogs, fish, bees, earthworms and other similar animals of a comparable nature, form and size including hatching, fattening, marketing, sale, slaughter, dressing, processing, and packing, including eggs, honey or similar products derived therefrom.
   3. Animal training schools.
   4. Kennels, dog and cat.
   5. Veterinary offices.

B. The following principal uses:

   1. Camps, youth.
   2. Camp grounds, picnic areas, trails with overnight camping facilities, including fishermen's and hunters' camps but not including structures for permanent human occupancy.
   3. Crops, field, tree, bush, berry and row, including nursery stock, the growing of.

4. Dwellings, one-family.
5. Electric distribution and electric transmission substations including microwave facilities in conjunction therewith, provided such use is not established within fifteen hundred (1,500) feet of any public building, park, school or residential zone.
6. Mushroom farms.
7. Oil wells pursuant to the provisions of Article 91 (Regulation of Principal Uses Permitted).
8. Parking lots as a supplemental use on lots or parcels of land adjoining or across an alley from any commercial or manufacturing zone, pursuant to the provisions of Article 91 (Regulation of Principal Uses Permitted).

C. The following additional principal uses on a lot or parcel of land having an area of not less than five (5) acres:

1. Breeding farms for the selective or experimental breeding of cattle, sheep, or horses or the raising and training of horses or show cattle and sheep.
2. Community auction grounds, exclusively for the sale of agricultural products.
3. Livestock sales yards.
4. Logging operations, involving only the actual controlled cutting and removing of trees with no sawmill operations.

5. Raising of cattle, sheep, goats and horses.
6. Riding academies and stables with boarding of horses.

D. The following additional principal uses on a lot or parcel of land having an area of not less than ten (10) acres:

1. Dairies, including the processing and sale of dairy products from milk lawfully produced on the premises.
2. Livestock feed yards.
3. Manure, the spreading, drying and sale of, providing no shaking or pulverizing machinery is used in connection therewith.

E. Other similar uses which the Commission finds to fall within the intent and purpose of this Zone, will not be more obnoxious or materially detrimental to the public welfare or to property in the vicinity of said uses and which the Commission finds to be of a comparable nature and of the same class as the uses enumerated in this Section.

Section 32.03 Accessory Uses Permitted

Premises in Zone A-2 may be used for accessory uses, provided such uses are established on the same lot or parcel of land, are incidental to, and do not substantially alter the character of any permitted principal use, including but not limited to:

1. Accessory buildings or structures other than for the housing, nurture or confinement of animals including but not limited to:

    a. Private garages, carports and children's playhouses.

    b. Tool houses, lathhouses and greenhouses.

    c. Windmills, silos, tank houses, buildings or shelters for farm equipment or machinery, water wells, water reservoirs and storage tanks.

    c. Stands for the purpose of displaying and selling agricultural products lawfully produced on the property, subject to the following conditions:

        (1) Floor area shall not exceed three hundred (300) square feet.

        (2) Not to exceed one (1) stand on a lot or parcel of land.

2. Accessory buildings or structures required for the housing, nurture, confinement or storage of animals, lawfully permitted or produced on the premises, provided such buildings or structures are located not less than fifty (50) feet from any street, highway or any building used for human habitation or residential zone.

3. Accessory signs as permitted in subsection F of Section 32.06.

4. Building materials, storage of, used in the construction of a building or building project, during

construction and thirty (30) days thereafter, including the contractor's temporary office, provided that any lot or parcel of land so used shall be a part of the building project or on property adjoining the construction site.

5. A caretaker's residence, where the legally established use requires the continuous supervision of a caretaker or superintendent, if occupied only by such persons and their families.

6. Cattle, goats, hogs or sheep, not to exceed two (2) such animals on a lot or parcel of land having an area of not less than twenty thousand (20,000) square feet, providing a dwelling unit is located thereon, and that such animals are not kept or housed within fifty (50) feet of any street, highway or any building used for human habitation.

7 A guest house.

8. Horses on a lot or parcel of land having an area of not less than twenty thousand (20,00) square feet, provided that said horses are kept or maintained for the private use of members of the family residing on the premises, but in no event more than one (1) such horse for each ten thousand (10,00) square feet of lot area, and that such horses are not kept or housed within fifty (50) feet of any street, highway, or any building used for human habitation.

9. Pets, household, provided that not to exceed three (3) mammals over four (4) months of age are kept for each dwelling unit.

10. Wild animals as specifically provided herein:

The following being permitted, provided such animals are kept and maintained at a place where the keeping of domestic animals is permitted:

a. Alpacas
b. Anoas
c. Antelopes
d. Armadilloes
e. Badgers
f. Beavers
g. Camels
h. Canaries
i. Chamoises
j. Chinchillas
k. Chipmunks
l. Cockateels
m. Deer
n. Finches
o. Foxes
p. Giraffes
q. Gopher snakes
r. Guinea pigs
s. Hamsters
t. Hawks
u. Kangaroos
v. King snakes
w. Koalas
x. Llamas
y. Marmosett monkeys
z. Minks
aa. Otters
ab. Ostriches
ac. Parrots and other birds of the psittacine family
ad. Peacocks
ae. Porcupines

af. Prairie dogs
ag. Raccoons
ah. Reindeer
ai. Seals
aj. Squirrel monkeys
ak. Tropical fish excluding caribe
al. Turtles
am. Wallabies
an. White mice
ao. White rats
ap. Zebras
aq. Other similar animals which, in the opinion of the Commission, are neither more obnoxious or detrimental to the public welfare than the animals enumerated in this Section.

Section 32.04 Uses Subject to Director's Review and Approval

Premises in Zone A-2 may be used for the following purposes subject to review and approval by the Director, pursuant to the provisions of Article 105 (Site Plan Review):

1. Access to property lawfully used for purposes not permitted in Zone A-2, provided no other practical access to such property is available, and such access will not alter the character of the premises in respect to permitted uses in Zone A-2.
2. Christmas trees and wreaths, the sale of, between December 1 and December 25, both dates inclusive, to the extent permitted by other statutory and ordinance provisions. Any structures, facilities and materials used for the sale of

trees and wreaths shall be removed from the premises by December 31 of the same calendar year, and the property restored to a neat condition.

3. Colleges and universities, including appurtenant facilities, giving advanced academic instruction approved by the State Board of Education or other recognized accrediting agency, but excluding trade or commercial schools.
4. Communication equipment buildings.
5. Country clubs.
6. Day care for children, family home.
7. Electric distribution and electric transmission substations including microwave facilities in conjunction therewith, except as otherwise provided in Section 32.02.
8. Fishing and casting ponds.
9. Golf courses.
10. Homes for aged persons, foster family.
11. Homes for children, foster family.
12. Microwave stations.
13. Parks, playgrounds and beaches, publicly owned, with all appurtenant facilities customarily found or permitted in conjunction therewith.
14. Riding and hiking trails.
15. Schools, through grade twelve (12), accredited, including appurtenant facilities, which offer instruction required to be taught by the Education Code of the State of California, in which no pupil is physically restrained, but excluding trade or commercial schools.

16. Ski lifts, tows, runs and warming huts.
17. Storage, temporary, of materials and construction equipment used in construction or maintenance of streets and highways, sewers, storm drains, underground conduits, flood control works, pipe lines and similar uses.
18. Telephone Repeater stations.

Section 32.05 Uses by Conditional Use Permit

Premises in Zone A-2 may be used for the following purposes, provided a permit has first been obtained, pursuant to the provisions of Article 102 (Variances and Conditional Use Permits):

1. Agricultural workers' living quarters, for persons employed and deriving the major portion of their income from employment on the premises.
2. Airports.
3. Bus terminals, storage and rental.
4. Cemeteries.
5. Churches, temples or other places used exclusively for religious worship, pursuant to the provisions of Article 94 (Regulation of Uses Established by Conditional Use Permit).
6. Circus winter quarters.
7. Convents and monasteries.
8. Correctional institutions including jails, farms and camps.
9. Day care for children, special home.
10. Day nurseries, children.

11. Electric generating plants, including microwave facilities in conjunction therewith.
12. Fairgrounds of a public character, when permanently located, including such commercial uses as are normally accessory or appurtenant thereto.
13. Farm equipment repair shops.
14. Farm labor camps, established to serve as temporary housing for migrant and temporary workers and their immediate families.
15. Fertilizer plants.
16. Fire stations.
17. Fruit and vegetable packing plant.
18. Gas measurement stations.
19. Golf driving ranges.
20. Guest ranches.
21. Heliports.
22. Helistops.
23. Hog ranches.
24. Homes for aged persons, small group care.
25. Homes for children, special boarding.
26. Hospitals.
27. Institutions for aged persons, private.
28. Institutions for children, private.
29. Land reclamation projects pursuant to the provisions of Article 94 (Regulation of Uses Established by Conditional Use Permit).
30. Libraries.
31. Lodge halls.
32. Menageries.

33. Mobilehome parks pursuant to the provisions of Article 94 (Regulation of Uses Established by Conditional Use Permit).
34. Museums.
35. Nursery schools, pre-school children.
36. Observatories.
37. Police stations.
38. Post office.
39. Private clubs.
40. Public utility service centers.
41. Race tracks.
42. Radio and television stations and towers, but not including studios.
43. Revival meetings, tent.
44. Rifle, pistol or skeet ranges.
45. Road construction and maintenance yards.
46. Rodeos.
47. Sawmills, only in conjunction with logging operations.
48. Solid fill projects.
49. Theaters, drive-in.
50. Water reservoirs, dams, treatment plants, gaging stations, pumping stations, and any use normal and appurtenant to the storage and distribution of water, other than as provided in Section 32.03.
51. Wild animal exhibitions.
52. Wild animals, the keeping of either individually or collectively for private or commercial purposes except as otherwise provided in Section 32.03.
53. Zoos.

Section 242 Zone A-2 (Heavy Agriculture) -Permitted Uses

Premises in Zone A-2 may be used for:

A. The following uses:

   1. Residence, single family.
   2. Crops, field, tree, bush, berry, and row including nursery stock.
   3. Day care for children, family homes.
   4. Homes for aged persons, foster family.
   5. Homes for children, foster family.

B. The following agricultural uses provided all buildings or structures used in connection therewith shall be located not less than fifty (50) feet from any street or highway or any building used or designed for human habitation.

   1. Animal hospitals.
   2. Animal shelters and pounds.
   3. Aquaria.
   4. Dairies, including the processing and sale of dairy products from milk lawfully produced on the premises on a lot or parcel of land having an area of not less than ten (10) acres.
   5. Dog kennels.
   6. Dog training schools.
   7. Feed mills on a lot or parcel of land with an area of not less than five (5) acres.
   8. Greenhouses on a lot or parcel of land with an area of not less than one (1) acre.

9. Hogs, the maintenance of not to exceed five (5) weaned hogs or pigs, subject to the requirements of Section 233 C.
10. Livestock feed yards on a lot or parcel of land having an area of not less than ten (10) acres.
11. Livestock sales yards on a lot or parcel of land having an area of not less than five (5) acres.
12. Manure, the spreading, drying and sale of, provided no shaking or pulverizing machinery is used in connection therewith on a lot or parcel of land having an area of not less than ten (10) acres.
13. Mushroom farms.
14. The raising of horses and other equine, cattle, sheep and goats, including the breeding and training of such animals, on a lot or parcel of land having an area of not less than one (1) acre, provided that
    a. On lots or parcels of land having an area of less than five (5) acres, eight (8) such animals may be kept or maintained per acre in conjunction with such use, and
    b. On lots or parcels of land having an area of five (5) acres or more, there shall be no limitation as to the number of such animals

which may be kept or maintained in conjunction with such use.

15. Raising of poultry, fowl, birds, rabbits, chinchilla, nutria, mice, frogs, fish, bees, earthworms, and other similar animals of comparable nature, form and size including hatching, fattening, marketing, sale, slaughtering, dressing, processing and packing, and including eggs, honey or similar products derived therefrom, on a lot or parcel of land with an area of not less than one (1) acre.
16. Riding academies and stables with the boarding of horses on a lot or parcel of land having an area of not less than five (5) acres.
17. Riding and hiking trails, but excluding trails for motor vehicles.
18. Veterinary.

C. The following uses provided they are located at least three hundred (300) feet from any public park, or any area in any residential zone:

1. Fairgrounds of a public character, when permanently located, including such commercial uses as are normally accessory or appurtenant thereto.
2. Fruit and vegetable packing plants.
3. Linseed, cottonseed, and coconut oil processing plants.

D. The following additional uses:

1. Campgrounds, picnic areas, trails with overnight camping facilities, including fishermen's and hunters' camps but not including structures for permanent human occupancy.

2. Camps, youth.

3. Logging operations, involving only the actual controlled cutting and removing of trees with no sawmill operations.

4. Oil wells including the installation and use of such equipment, structures, and facilities as are necessary or convenient for all drilling and producing operations customarily required or incidental to usual oil field practice, including but not limited to, the initial separation of oil, gas and water, and for the storage, handling, recycling and transportation of such oil, gas and water to and from the premises. This subsection does not permit refineries or absorption plants. The use permitted by this subsection is subject to the following conditions, except that by specific action in each instance the Commission may waive or modify any one or more of such conditions if it finds that such waiver or modification will not result in material detrimental to the public welfare or to the property of other persons located in the vicinity thereof:

a. Drilling shall not be within three hundred (300) feet of any residence, except the residence of the owner of the land on which the well is located and except a residence located on land which, at the time of the drilling of the well, is under lease to the person drilling the well.

b. If the drilling is within five hundred (500) feet of one or more residences except the residence of the owner of the land on which the well is located and except a residence located on land which, at the time of the drilling of the well is under lease to the person drilling the well, that:

   (1) All derricks used in connection with the drilling of the well shall be enclosed with fire-resistant and sound-proofing material unless the heads of all families occupying any residence within 1320 feet (one-quarter mile) of the drilling site, other than of a residence described at the beginning of this paragraph b., files a written waiver with the Commission.

(2) All drilling and pumping equipment shall be operated by muffled internal combustion engines or by electric motors.

(3) Materials, equipment, tools, or pipe used for either drilling or producing operations at the well hole shall not be delivered to or removed from the drilling site except between the hours of 8:00 a.m. and 6:00 p.m. of any day, except in case of emergency.

c. The derrick used pursuant to this section to drill any well hole or to repair, clean out, deepen or redrill any completed or drilling well, shall be removed within ninety days after completion or abandonment of any well.

d. Within ninety days after abandonment of any well, earthen sumps used in drilling or production, or both, shall be filled and the drilling site restored as nearly as practicable to its original condition.

e. Any unattended earthen sump located within 1320 feet (one-quarter mile) of the nearest highway or within 2640 feet (one-half mile) of 20 or more residences shall be enclosed with a fence not less than five (5) feet high mounted on steel posts with not less than three (3) strands of barbed wire around the top. Such fence shall be constructed of woven wire fencing or equivalent of not greater than six (6) inch mesh.

f. When private roads to wells are constructed, that portion of such roads lying within two hundred (200) feet of an oiled or surfaced public highway, or of an existing residence, shall be oiled or surfaced.

g. A well hole, derrick, or tank shall not be placed within twenty (20) feet of any public highway.

h. Except as provided in Section 243, a faithful performance bond of two thousand dollars ($2,000.00) shall be filed with the Board of Supervisors for each well for the first five (5) wells. Where more than five wells are drilled, ten thousand dollars ($10,000.00) in bonds shall be the total required of all oil operators. Either such bond shall include as obligees all persons who may be damaged or annoyed by such use or a policy of insurance shall be filed with the Board of Supervisors having a maximum amount of recovery not less than the amounts required of a bond, directly insuring all persons who may be damaged or annoyed by such use.

i. All drilling and producing operations shall conform to all applicable fire and safety regulations.

j. Not more than two (2) production tanks, neither to exceed one thousand (1,000) barrels capacity, shall remain on the premises following completion of production tests at each well, provided however, that this condition shall not restrict the maintenance of additional tanks for storage and shipping.

k. Proven technological improvements in drilling and production methods shall be adopted as they may become, from time to time, available if capable of reducing factors of nuisance and annoyance.

l. All drilling and production operations shall be conducted in such a manner as not to constitute a public nuisance.

m. Signs shall not be constructed, erected, maintained, or placed on the premises or any part thereof, except those required by law or ordinance to be displayed in connection with the drilling or maintenance of the well.

n. Suitable and adequate sanitary toilet and washing facilities shall be installed and maintained to a clean and sanitary condition at all times.

5. Parks, playgrounds and beaches with all appurtenant facilities customarily found in conjunction therewith.

6. Youth hostels.

Section 242.1 Zone A-2 - Accessory Uses

Property in Zone A-2 may be used for:

A. The following accessory uses subject to the same limitations and conditions provided in Section 207.3. (Zone R-1):

1. Accessory buildings and structures.
2. Animals, domestic and wild, maintained or kept as pets or for personal use as provided in Article 12 , of Chapter 7.
3. Building materials, storage of.
4. Detached living quarters for guests or servants.
5. Living quarters for servants, attached to such residence.

6. Room rentals.

B. Stands for the display and sale of any products, the production of which is permitted in Zone A-2 by Section 242, and which have lawfully been produced on such lot or parcel of land provided:

   1. That said stand shall be exclusively of wood frame construction (except the floor).
   2. That said stand shall have a floor area of not more than three hundred (300) square feet.
   3. That said stand shall be located not nearer than twenty (20) feet from any street or highway upon which such lot or parcel fronts or adjacent residences.
   4. That said stand will be on a parcel of land not less than one (1) acre in area.

C. Signs as provided in Article 7 of Chapter 7.

Section 242.2 Zone A-2 - Uses Subject to Director's Review and Approval

If site plans therefor are first submitted to and approved by the Director, premises in Zone A-2 may be used for:

A. The following uses subject to the same limitations and conditions provided in Section 207.5 (Zone R-1):

   1. Access to property lawfully used for a purpose not permitted in Zone A-2.
   2. Carnivals, temporary.
   3. Grading projects, off-site transport.

4. Mobilehomes used as a residence during construction.
5. Model homes.
6. Parking lots as a transitional use.
7. Real estate tract offices, temporary.

B. The following additional uses:

1. Christmas trees and wreaths, the sale of, between December 1 and December 25, both dates inclusive,to the extent permitted by other statutory and ordinance provisions. Any structures, facilities and materials used for the sale of trees and wreaths shall be removed from the premises by December 31 of the same calendar year, and the property restored to a neat condition.
2. Day nurseries, children, where operated in conjunction with and incidental to a legally established accredited school offering instruction required to be taught by the Education Code of the State of California.
3. Schools, through grade twelve (12) accredited, including appurtenant facilities, which offer instruction required to be taught in the public schools by the Education Code of the State of California in which no pupil is physically restrained but excluding trade or commercial schools.
4. Signs as provided in Article 7 of Chapter 7.

Section 242.3 Zone A-2 - Uses Subject to Permits

Property in Zone A-2 may be used for:

A. The following uses provided a conditional use permit has first been obtained as provided in Article 1, Chapter 5 and while such permit is in full force and effect in conformity with the conditions of such permit for:

   1. Airports.
   2. Amphiteaters having a seating capacity of not to exceed five hundred (500) seats, but excluding drive-in theaters.
   3. Arboretums and horticultural gardens.
   4. Athletic fields, excluding stadiums.
   5. Churches, temples or other places used exclusively for religious worship including customary incidental educational and social activities in conjunction therewith.
   6. Circus winter quarters.
   7. Communication equipment buildings.
   8. Convents and monasteries.
   9. Correctional institutions including jails, farms, and camps.
   10. Day care for children, special homes.
   11. Day nurseries, children, except as otherwise provided in Section 242.2.
   12. Earth stations.
   13. Electric distribution substations, electric transmission substations, and

generating plants including microwave facilities used in conjunction with any one thereof.

14. Farm equipment repair shops.
15. Farm equipment, storage, sales and rental.
16. Farm labor camps.
17. Fertilizer plants.
18. Fire stations.
19. Gas metering and control stations, public utility.
20. Golf courses including the customary clubhouse and appurtenant facilities.
21. Golf driving range.
22. Grading projects, off-site transport, where more than one hundred thousand (100,000) cubic yards of material is to be transported, subject to the conditions and limitations of Sections 501.14 and 501.15.
23. Grading project, on-site but excluding projects where the Commission or the Board of Supervisors have previously considered such grading proposal as indicated by approval of an Environmental Document incorporating consideration of such grading project.
24. Grange halls.
25. Guest ranches.

26. Heavy equipment training school on a lot or parcel of land having an area of not less than one hundred (100) acres.
27. Health retreats subject to the conditions of Section 246.
28. Heliports.
29. Helistops.
30. Homes for aged persons, small group care.
31. Homes for children, special boarding.
32. Hospitals.
33. Institutions for aged persons, private.
34. Intitutions for children, private.
35. Juvenile halls.
36. Land reclamation projects.
37. Landing strips.
38. Libraries.
39. Living quarters for persons employed and deriving a major portion of their income on the premises, if occupied by such persons and their immediate families.
40. Menageries, zoos, animal exhibitions or other similar facilities for the keeping or maintaining of wild animals, except as otherwise provided in Section 242.5.
41. Microwave stations.
42. Mobilehome parks subject to the conditions of Article 13 of Chapter 7.

43. Mobilhomes for use by a caretaker and his immediate family in accordance with Article 13 of Chapter 7.

44. Mobilhomes used as a residence of the owner and his family during the construction by such owner of a permanent single family residence but only while a building permit for the construction of such residence is in full force and effect and in no event longer than one (1) year in addition to that provided for in Section 242.2.

45. Motion picture sets, including the temporary use of domestic and wild animals in motion picture and television production, provided the said animals are kept or maintained pursuant to all regulations of the Los Angeles County Department of Animal Control, and are not retained on the premises for a period exceeding sixty (60) days. The Director may extend such time period for not to exceed thirty (30) additional days subject to the provisions of Article 8 (Director's Review) of Chapter 5.

46. Museums.

47. Nudist camps.

48. Observatories.

49. Outdoor festivals.

50. Pest control operations.

51. Plant nursery retail subject to the conditions of Section 246.

52. Police stations.

53. Publicly owned uses necessary to the maintenance of the public health, convenience or general welfare in addition to those specifically listed in this Section.

54. Public utility service centers.

55. Public utility service yards.

56. Radio and television stations and towers, but not including studios.

57. Recreation clubs, private, including tennis, polo and swimming. Where specifically designated a part of an approved conditional use permit such use may include a pro shop, restaurant and bar as appurtenant uses.

58. Recreational trailer parks on a lot or parcel of land having an area of not less than five (5) acres as provided in Article 13 of Chapter 7.

59. Refreshment stands operated in conjunction with and intended to serve the patrons of a use permitted in Zone A-2, but not as a separate enterprise.

60. Residence, caretaker's - A conditional use permit may be granted for a caretaker's residence even though the number of existing residences on the lot or parcel of land is the maximum number permitted as of course by Section 702.7.

61. Revival meetings, tent.

62. Rifle, pistol, skeet or trap ranges.
63. Road construction and maintenance yards.
64. Rodeos, but not including horse racing.
65. Sawmills, only in conjunction with logging operations.
66. Sewage treatment plants.
67. Signs as provided in Article 7 of Chapter 7.
68. Solid fill projects.
69. Stations, bus, railroad, taxi.
70. Storage, temporary, of materials and construction equipment used in construction or maintenance of streets and highways, sewers, storm drains, underground conduits, flood control works, pipe lines and similar used for a period not to exceed one (1) year.
71. Subdivision directional signs subject to the limitations and conditions of Article 6 of Chapter 5.
72. Telephone repeater stations.
73. Terminals, bus and railroad.
74. Theaters, drive-in.
75. Theaters, Amphitheaters having a seating capacity of not to exceed five hundred (500) seats, but exluding drive-in theaters.
76. Water reservoirs, dams, treatment plants, gaging stations, pumping stations, tanks, wells and any use normal

and appurtenant to the storage and distribution of water.

77. Wild animals, the keeping of either individually or collectively for private or commercial purposes except as otherwise provided in Section 242.5.

B. The following uses provided the specified permit has first been obtained, and while such permit is in full force and effect in conformity with the conditions of such permit for:

1. Cemeteries as provided in Article 4 of Chapter 5.
2. Explosives storage as provided in Article 5 of Chapter 5.
3. Mobilehomes, individual placement of a mobilehome containing one (1) dwelling unit in lieu of a single family residence on a lot or parcel of land having as a condition of use the area requirement of the zone but in no case with an area of less than two and one-half (2 1/2) acres as provided in Article 12 of Chapter 5.
4. Surface mining operations as provided in Article 11 of Chapter 5.

Motion to Dismiss or Affirm

1

Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS
CLERK

No. 81-1700

IN THE

Supreme Court of the United States

October Term, 1981

ROBERT J. GILLILAND, *et al.*,

Appellants,

vs.

CITY OF PALMDALE and COUNTY OF LOS ANGELES,

Appellees.

On Appeal From the Supreme Court of California.

MOTION TO DISMISS APPEAL OR AFFIRM.

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Question Presented.

If a property owner buys a piece of unimproved land then zoned for agricultural and other uses and, there having been no change of zone and no improvement in the meantime, later requests that the zoning of his parcel be changed to allow commercial uses; and if the market value of the property would be substantially increased were it to be advertisable as zoned for commercial uses; and if the local legislative body denies the change of zone because no need exists for commercially zoned land at the location and because future commercial use would be inconsistent with the present and future use of a nearby developed and improved parcel devoted to aircraft construction and airport operations; has the local governmental entity, by denying a change of zone which would substantially increase the market value of the subject, taken it without just compensation in violation of the Fifth Amendment?

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No. 81-1700

IN THE

Supreme Court of the United States

October Term, 1981

ROBERT J. GILLILAND, *et al.*,

Appellants,

vs.

CITY OF PALMDALE and COUNTY OF LOS ANGELES,

Appellees.

MOTION TO DISMISS APPEAL OR AFFIRM.

Appellee, County of Los Angeles, moves that the appeal herein be dimissed or alternatively that the judgment be affirmed, on the grounds that:

1. No substantial federal question is raised because the California decision is that no taking without compensation is adequately pleaded;

2. The decision that no taking has been pleaded is based on California law, an adequate non-federal basis;

3. Furthermore, the decision that no taking has been pleaded under applicable law is in conformity with federal cases, including leading cases on the taking issue decided by this Court.

Statement of the Case.

This is an appeal from the sustaining of a general demurrer without leave to amend after counsel for appellants represented that no substantially different facts could be pleaded.

A copy of the First Amended Complaint for Inverse Condemnation, the dismissal of which is the subject of this appeal, is attached as Appendix 1.

The Court of Appeal of the State of California affirmed the judgment of dismissal following the sustaining of demurrer because "[u]ltimately, the Gillilands fail[ed] to allege facts which constitute a taking of property." See Jurisdictional Statement (hereafter "J.S."), Appendix D 8-9; *Gilliland v. County of Los Angeles*, 126 Cal.App.3d 610, 617, 179 Cal.Rptr. 73, 78 (1981) (hereafter "*County* case").

The California Supreme Court refused to grant a hearing. J.S., Appendix H-1.

The Gillilands purchased the subject property of the *County* appeal in 1967. It was then, and is now, zoned A-2-5, which zoning allows agricultural and other uses, including residential. See J.S., Appendix N 1-18.

The property was at all pertinent times, and is now, unimproved and undeveloped.

In 1973 the Los Angeles County Board of Supervisors, on appeal from the Regional Planning Commission of Los Angeles County, denied the requested up-zoning of the subject property to "CPD," commercial planned development.

The appellants contend that since the property would have substantially greater market value if up-zoned to commercial planned development, the denial of up-zoning constitutes an uncompensated taking of the property by the County of Los Angeles.

According to the First Amended Complaint, the reasons for the denial of the up-zoning were that there was no need for additional commercially zoned land in the area (see Appendix 1-3) and that commercial development of the subject property would be inconsistent with proposed future airport development and with existing and future airport operations at Air Force Plant 42, an adjoining parcel which was already improved and developed. See Appendix 1-3.

The appellants do not allege or contend that their purchase in 1967 preceded the commencement of large scale aircraft construction and airport operations at the nearby Air Force Plant 42.

Appendix 2, attached hereto, is a copy of the applicable County of Los Angeles zoning ordinance, pertaining to zone CPD, the requested zoning, which was made the subject of judicial notice by the California Court of Appeal. See J.S., Appendix E-1. Note that development of CPD-zoned property (as opposed to sale) requires a conditional use permit under section 262(B) of Appendix 2.

No application for a conditional use permit is pleaded in the First Amended Complaint. See Appendix 1.

ARGUMENT.

I.

If No Taking Without Compensation Has Been Pleaded the Issue of Remedies Is Not Raised.

In *Agins v. Tiburon*, 447 U.S. 255 (1980), this Court said: "Because no taking has occurred, we need not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation." *Id.* at 263.

The California Court of Appeal, herein, held that there had been no adequate pleading of a taking without compensation. *Gilliland v. County of Los Angeles*, 126 Cal.App.3d 610, 617, 179 Cal.Rptr. 73, 78 (1981).

The trial court, herein, also, necessarily, made such a ruling; because declaratory relief was prayed for in the First Amended Complaint and this is a proper remedy for an uncompensated taking by zoning activities under *Agins v. Tiburon*, 24 Cal.3d 266, 276-77, 157 Cal.Rptr. 372, 378 (1979).

Since, it is very clear that a refusal to up-zone to a more valuable zoning from a zoning that was in effect when the plaintiff purchased the property, does not and should not constitute an uncompensated taking, this Court should dismiss this appeal.

Appellants are here asking this Court to expressly over rule *Agins v. Tiburon*, 24 Cal.3d 266, 157 Cal.Rptr. 372 (1979), as to remedies for uncompensated taking by zoning activities even though they have not pleaded an uncompensated taking.

II.

The Existence of a Right in Real Property Is a Question of State Law.

The Fifth and Fourteenth Amendments and the Civil Rights Act, 42 U.S.C. §1983, do not create rights in property. They protect rights in property arising from state law.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972); *Rodic v. Thistledown Racing Club, Inc.*, 615 F.2d 736, 739 (6th Cir. 1980); *Ellentuck v. Klein*, 570 F.2d 414, 429 (2nd Cir. 1978).

To state a cause of action for an uncompensated taking, "an invasion or an appropriation of some valuable property right" of the landowner must be pleaded. *Hilltop Properties v. State of California*, 233 Cal.App.2d 349, 355-56, 43 Cal.Rptr. 605, 609 (1965); 37 A.L.R.3d 109.

Under the law of California and decisions of this Court and lower federal courts a landowner has no right to a change of zone from that in force at the time of purchase to a more valuable zoning. Therefore, denial of such an upzoning could not constitute a taking.

III.

The Owner of Undeveloped Real Property Has No Vested Right in the Zoning in Effect at the Time of Purchase, Much Less a Right to a Change to a More Valuable Zoning.

Under the common law of California and other states, and decisions of this Court, the purchaser of undeveloped land has no vested right in existing zoning, and certainly no right to different and more valuable zoning than that which attached at purchase. *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 679 at fn. 13 (1976); *Oceanic California, Inc. v. City of San Jose*, 497 F.Supp. 962, 974 (N.D. Cal. 1980); *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 791, 132 Cal.Rptr. 386, 389-90 (1976), *cert. den.*, 429 U.S. 1083 (1978); *Trans-Oceanic Oil Corp. v. Santa Barbara*, 85 Cal.App.2d 776, 782-98, 194 P.2d 148, 152-60 (1948).

Appellants cite no authority for the proposition that a purchaser of undeveloped property in a "holding zone" has a vested right to a change to more valuable zoning. There is no such language in the County's ordinance. Such a rule would render low density zoning of undeveloped land meaningless and would remove the discretion of local planners to regulate such land.

IV.

A Property Owner Has No Right to Have His Property Zoned so as to Maximize Its Market Value.

It is well-established that a *down-zoning* which substantially reduces the market value of a parcel does not, in itself, constitute a taking. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 131 (1978).

Therefore, refusal to up-zone and, thus, make the property substantially more valuable, clearly is not a taking.

It is well-established that there is no right to have property zoned to maximize its market value, or, in eminent domain terms, zoned to its highest and best use. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384-85 (1926); see also *Deltona Corp. v. United States*, 657 F.2d 1184, 1192-93 (Ct. Cl. 1981).

V.

When a Zoning Ordinance Is Facially Constitutional, There Can Be No Taking by Land-Use Regulation Unless There Is a Denial of a Development Plan.

Appellants do not contend that the zoning ordinance of Los Angeles County, as it describes A-2-5 or CPD zoning, or otherwise, is unconstitutional on its face.

A zoning ordinance may constitute a taking *as applied* to a specific parcel only if the local zoning authority denies a development plan. *Agins v. Tiburon*, 447 U.S. 255, 260-63 (1980).

No known case of any jurisdiction has held that simple denial of an up-zoning to a more valuable zoning constitutes a taking by land-use regulation.

Appellants do not allege that they have been denied permission for any of the uses allowed under A-2-5 zoning in the County's ordinance. J.S., Appendix N 1-18.

Appellants do not even allege that they have requested a variance for a specific use not allowed under A-2-5, on the ground of hardship, and been denied.

Section 262(B) of the County zoning ordinance, Appendix 2, requires that a conditional use permit be granted before there can be actual commercial development of property zoned CPD.

Since the granting of such a permit is a necessary precondition for actual commercial development and use, the denial of the up-zoning to CPD did not constitute a denial of a use or denial of a development plan.

Had the up-zoning to CPD been granted, the only thing the appellants could have done with the land, without going through an expensive application for a conditional use permit, would have been to sell it at a higher price than if it were zoned A-2-5.

Since there is no contention of facial unconstitutionality of the County ordinance; since there is no allegation of submission of and denial of any development plan; since there is no allegation of denial of permission for any use allowed under A-2-5; since there is no allegation of any request for hardship variance from A-2-5 use which was denied; there is no allegation of any denial of use and this appeal should be dismissed under this Court's decision in *Agins*.

VI.

Conclusion.

Nearby landowners under typical zoning ordinances have an absolute right to object to a nearby change of zone which they believe will affect their property. There could be no exception excluding the U.S. Air Force, large aircraft manufacturing corporations, or operators of airports.

The allegation of unfair tax assessment in light of the refusal to change the zone is irrelevant. There is a right to appeal unfair tax assessments in California and the California record on appeal indicates that, as of December, 1978, there had been no appeal of the assessed value of the County-zoned property since an appeal and reduction of assessment in 1972-73.

This unimproved property is zoned today exactly as it was the day appellants bought it.

They do not allege that it is now worth less on the market than they paid for it.

They do not allege that they have been denied any specific use allowed by the County ordinance or any specific variance requested for hardship.

They allege that the value would have been greatly enhanced if they had been granted a change of zone. Of how many millions of parcels of unimproved real property under the ultimate jurisdiction of this Court could that be said?

If appellants gambled on a change of zone to CPD and lost, why should the people of Los Angeles County cover their loss, if any?

This appeal should be dismissed or this judgment affirmed.

Respectfully submitted,

JOHN H. LARSON,
County Counsel,
PAUL T. HANSON,
Deputy County Counsel,
Attorneys for Appellee,
County of Los Angeles.

Appendix

APPENDIX 1.

First Amended Complaint for Inverse Condemnation

Superior Court of the State of California for the County of Los Angeles.

Frank M. Gilliland, Jr., James S. Gilliland, and Robert J. Gilliland, Plaintiffs, vs. County of Los Angeles, Defendant. No. C 107093.

The Plaintiffs, the Gillilands allege:

1

The Defendant, the County of Los Angeles (the County) is a political subdivision of the State of California.

2

The Gillilands own the following real property (the Subject Property):

> Lots 41, 60 and 61 of Tract 7670, as per map recorded in Book 114, pages 28-30 in the office of the County Recorder of Los Angeles County.

The Subject Property contains some 30 acres of vacant land. The Gillilands have owned the Subject Property for 7 years since 1967.

3

At all times pertinent hereto, the Subject Property has been located in unincorporated county territory, and as such has been within the zoning and planning jurisdiction of the County.

4

The Subject Property is and, at all times pertinent hereto, was zoned A 2-5, which zoning under the County's Zoning Ordinance is an Agricultural zone. Said zoning permits single family residential use on the basis of two residences for each five acres of property.

5

The A 2-5 zone is used by the County as a "holding zone". A "holding zone" is a zone where the land is held to minimal use as a means of keeping control of land use in the County beyond the usual zoning control. When an owner of land in a "holding zone" comes to the County for permission to use his land for its highest and best use, the County is in a position, by relying on the minimal use permitted in the "holding zone", to exercise precise control over proposed new uses by withholding zone change unless the County approves the specific proposed land use, site utilization and sometimes aesthetics of the proposed use to be made of the land.

6

Real property taxes have been assessed to and paid by the Gillilands not based upon A 2-5 uses, but instead upon recognition of the "holding zone" status and the highest and best use for which the land is adapted.

7

The assessed value and the resulting real property taxes of the Subject Property, from the time of its purchase in 1967, through the tax year 1972-73, has increased over 600% due to increased commercial and industrial development, within the last 7 years, of the Subject Property and the surrounding area.

8

As a further result of this development, the Gillilands have been requested and did grant easements and dedicate portions of the Subject Property for purposes of its urbanization, including street widening, curbing, drainage and utilities.

9

In February, 1973, the Gillilands applied to the County Regional Planning Commission for a zone change of the Subject Property to CPD, a commercial planned development zone.

10

On February 20, 1973, the County Regional Planning Commission denied the Gillilands' request for a zone change on the stated grounds that the Subject Property lies within the primary impact area of the proposed Palmdale Intercontinental Airport and that adequate demonstration of need for additional commercial zoning in the general area of the Subject Property had not been made.

11

The Gillilands appealed the decision of the County Regional Planning Commission to the County Board of Supervisors. On April 26, 1973, the County Board of Supervisors heard testimony opposing the requested zone change from a representative of Air Force Plant 42, and from a representative of Lockheed, McDonnell Douglas, Rockwell International and Northrop, four aircraft companies with facilities in the proximity of the Subject Property. The Board then voted to deny the Gillilands' request for a zone change based on testimony that the Subject Property was within the area which received noise of 100 db(A) or more from Air Force Plant 42. Air Force Plant 42 is an airport with commercial manufacturing conducted thereon of which the best known is the assembly of the Lockheed L 1011, jumbo air bus.

12

By reason of the refusal to rezone by the County, the Gillilands' private property has been unlawfully taken and damaged for public use without just compensation, and without due process and equal protection of the laws to which property owners are entitled by the United States and California Constitutions.

13

As a result of the refusal to permit the commercial use for which the Subject Property is adapted and had dedicated land to prepare for, the Gillilands have been deprived of beneficial use of the Subject Property to wit: the use, enjoyment, right to develop and sell the Subject Property.

14

The Gillilands are informed and believe and on such ground allege that the acts of the County alleged above, were intended by the County to stultify the lawful use of the Gillilands' land, to reduce the value thereof, to render it unsalable and unusable for any reasonable private uses, and thereby to accomplish a *de facto* transformation of said private land into public property, without payment of just compensation. Said conduct of the County was unreasonable, unlawful, arbitrary and discriminatory.

15

By reason of the above acts of the County, the Gillilands have been damaged in an amount in excess of $825,000.00.

16

Before filing this action, the Gillilands duly filed a timely claim with the County, which claim was rejected in writing on June 14, 1974.

17

The taking of the Gillilands' property was for a public use; namely, to provide space for the approach and departure of jet aircraft to and from Air Force Plant 42. The County burdened the Gillilands' property with a servitude for airport use. The County's act of burdening the Gillilands for the

Air Force is in furtherance of the County's determination of its own best interest in keeping Air Force Plant 42 operating in Los Angeles County.

18

The County took the use of the Gillilands' property by the agreement between the County and the United States.

19

The County took the use of the Gillilands' property from the Gillilands and placed the use in the United States.

20

By reason of the foregoing, the County's zoning ordinance, as applied to the Gillilands' property, is invalid.

21

The Gillilands have no adequate remedy at law because of *Agins v. City of Tiburon* (1979) 23 C 3d 605.

22

By reason of the foregoing, the Gillilands have been deprived of their property without just compensation or due process of law in violation of:

- The Fifth Amendment to the United States Constitution;
- the Fourteenth Amendment; and
- the Federal Civil Rights Act, 42 USC §1983.

23

The United States Constitution is the Supreme Law of the Land and is to be recognized and enforced notwithstanding the law of California to the contrary.

WHEREFORE, the Gillilands pray judgment for:

1. Just compensation for the taking and damaging of their property be ascertained by a jury;
2. Damages under the Federal Civil Rights Act;

3. Declaratory Judgment and Injunctive Relief in invalidating the Los Angeles County Zoning Ordinance as applied to the Gillilands' property;
4. All cost of litigation, including attorneys' and expert fees;
5. Costs of suit; and
6. Such other relief as the Court deems just.

Fadem, Berger, & Norton
Attorneys for Plaintiffs
/s/ WILLIAM STOCKER
Attorneys for Plaintiffs

Motion to Dismiss or Affirm

2

Supreme Court, U.S.
FILED
APR 15 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1700

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1981

ROBERT J. GILLILAND, MARY P. FITZ,
JAMES S. GILLILAND, and FRANK M.
GILLILAND,
Petitioners,

vs.

CITY OF PALMDALE and COUNTY OF
LOS ANGELES,
Respondents.

APPEAL FROM
COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

MOTION TO DISMISS

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Respondents.

MOTION TO DISMISS

MOTION

Respondent, CITY OF PALMDALE, hereby moves this Court for an order dismissing the appeal from the California Court decision in GILLILAND VS. CITY OF PALMDALE on the following grounds:

1. The appeal is from a state Court and does not present a substantial federal question.

2. Some of the federal questions sought to be reviewed were not expressly passed on by the state court.

3. The federal questions presented are utterly without foundation and so absolutely devoid of merit as to be frivolous.

This motion is made pursuant to Supreme Court Rules, Rule 16.

INTRODUCTION

The only question properly before this Court is whether the City's refusal to grant the owners' application to change the zoning of their property from A-2 (low density agricultural uses) to CPD (high density commercial uses) constituted a taking of the owners' property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution.

The owners purchased the property in 1965. At the time of the acquisition, the property was zoned A-2. The permissible uses of the property under that zoning classification included construction of two single family dwellings on a five acre parcel, animal hospitals, schools and kennels, veterinary offices, youth camps and other campgrounds, crops, auction grounds, stockbreeding and yards, riding academies and stables (See Appendix A).

In January, 1973, the owners applied to the Palmdale Planning Commission for a zone change to CPD, a commercial plan development zone, which would allow high density commercial uses. On May 11, 1973, the owners' request for the zone change was denied by the City.

The City refused to grant the zone change requested by the owners because the property lies in the takeoff and approach to one of the runways at Air Force Plant 42 in Palmdale, California, which is a facility used by the United States Air Force for, among other things, the landing and departure of test aircraft. Air Force Plant 42 and the runway were in existence when the owners purchased the property.

On April 15, 1975, the owners filed their Amended Complaint for Inverse Condemnation against the City of Palmdale (Appendix B). The City filed a motion for judgment on the pleadings which was heard on July 18, 1975. The trial Court, after having reviewed and considered the pleadings and outline of the evidence as presented by counsel for

Plaintiff, found that there was no taking or damaging of property. (Appendix C)

The California Court of Appeals affirmed the judgment on pleadings without leave to amend (Appendix D) and stated:

> As analyzed by the standards of the federal 'taking' cases, the A-2 zoning of Plaintiff's land does not deprive him of the property rights protected in the Fifth and Fourteenth Amendments to the United States Constitution. No set of facts that Plaintiff could prove would entitle him to relief under the Federal Civil Rights Act.

THE TRIAL COURT'S RULING

Under California law, a motion for judgment on the pleadings is tantamount to a general demurrer, and allegations in the complaint must be taken as true in resolving the question whether a cause of action has been stated. Tiffany v. Sierra Sands Unified School District (1980), 103 Cal. App. 3d 218, 222, 162 Cal. Rptr. 669. However, under California Practice, allegations in a complaint are to be taken true unless contrary to law or to a fact of which a Court may take judicial notice. Dale v. City of Mountain View (1976), 55 Cal. App. 3d 101, 105, 127 Cal. Rptr. 520. California courts may take judicial notice of municipal ordinances. California Evidence Code §452(b).

The allegations set forth in the owners' Amended Complaint for Inverse Condemnation can be summarized as follows. The owners purchased five acres of vacant property located within the boundaries of the City of Palmdale. At the time the property was purchased, it was zoned A-2. In January, 1973, the owners applied for a zone change from A-2 to Commercial Plan Development, a high density use. On May 11, 1973, the City Council of the City of Palmdale denied the request for the zone change because of the property's proximity to the runway at Air Force Plant 42. The refusal to grant a rezoning to conform to the highest and best use, and indeed the only economically feasible use, was for the purpose of devoting the subject property to public use. The City's refusal to rezone the property constituted a taking of the owners' property without just compensation and without due process and equal protection of the laws to which the owners are entitled by the United States and California Constitutions. As the result of the refusal to permit high density commercial uses of the subject property, the owners have been deprived of the beneficial use of the subject property. As the result of the City taking the owners' property without just compensation, the owners were damaged in an amount in excess of $325,000.00.

In addition to the pleadings, the trial Court and the Court of Appeals took judicial notice of the permissible uses allowed under the zoning classification of A-2.

Based on the pleadings and the outline of evidence as presented by counsel for Plaintiff, the trial Court granted the motion for judgment on the pleadings and the Court of Appeals affirmed.

QUESTIONS 4 and 5 RAISED IN THE JURISDICTIONAL STATEMENT DO NOT STATE SUBSTANTIAL FEDERAL QUESTIONS.

If no substantial federal question is raised in light of prior decisions of this Court, the appeal must be dismissed. Palmer Oil Corp. v. Amerada Corp. (1952), 343 U.S. 390, 391, 96 L.Ed. 2d 1022. Questions 4 and 5 have been conclusively decided by prior decision of this Court, and do not raise substantial federal questions.

Question 4 states: "Is it constitutionally permissible for a state to regulate for the express purposes of violating the Fifth and Fourteenth Amendment prohibitions against devoting property to a public use without compensating the owner?"

The question raises the issue whether a state may enact regulations which are contrary to federal law. This Court in McCulloch v. Maryland (1819), 17 U.S. 316, held that the

Constitution and laws of the United States are the supreme law of the land. The Supremacy Clause of the United States Constitution, Article VI, Clause 2, prohibits states from enacting laws or regulations which are contrary to federal law. Question 4 has been decided.

Question 5 states: "Is it constitutionally permissible for a state to refuse to enforce federal remedies when a federal cause of action is prosecuted in that state's courts?"

In the landmark case of Claflin v. Houseman (1876), 93 U.S. 131, 136-137, 23 L.Ed. 833, this Court held that state courts are bound by the Supremacy Clause of the United States Constitution, Article VI, Clause 2, to enforce federal rights that arise under the laws of the United States. (See Testa v. Katt (1946), 330 U.S. 386, 91 L.Ed. 967, holding that state courts are not free under Article VI of the United States Constitution to refuse enforcement of federal claims.)

California courts have long recognized that state courts may not refuse to enforce a claim arising under the laws of the United States where Congress has not given the Federal Courts exclusive jurisdiction. (See Leet v. Union Pacific Railroad Co. (1944), 25 Cal. 2d 605, 155 P.2d 42, Schultz v. Union Pacific Railroad Co. (1953) 118 Cal. App. 2d 169, 257 P.2d 1003.

Obviously, Questions 4 and 5 do not raise substantial federal questions.

THE CALIFORNIA COURT HAS ONLY CONSIDERED AND DECIDED THE TAKING ISSUE.

The owners attempt to raise two issues by this appeal. The first issue is whether the City by regulation has taken the property without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution. The second issue is, if a taking has occurred, what is the appropriate remedy. Only the "taking issue" was considered and decided by the state court.

The owners urge this Court to resolve the conflict between the California Supreme Court decision in Agins v. City of Tiburon (1979), 24 Cal. 3d 266, 157 Cal. Rptr. 372, and the view expressed by Justice Brennan in his dissenting opinion in San Diego Gas and Electric Co. v. City of San Diego (1981), 450 U.S. 621, 67 L.Ed. 2d 551, whether an owner whose property is taken by regulation without just compensation is entitled to compensatory damages. However, it has long been the rule of this Court that in review of the judgment of a state court it will not consider federal questions which were not raised or decided by the state court. See McGolerick v. Compagnie Gen. Transatlantique (1940), 390 U.S. 429, 430, 84 L.Ed. 849. It is respectfully submitted that the State Court properly decided the "taking" issue and that it would be improvident for this Court to note probably jurisdiction for the purpose of deciding the "remedy" issue.

QUESTION 3 RAISED IN THE JURISDICTIONAL STATEMENT DOES NOT STATE A SUBSTANTIAL FEDERAL QUESTION.

Question 3 can be restated to clearly raise the issue: Is it constitutionally permissible for a state court to sustain a general demurrer, or in federal parlance, grant a motion to dismiss, against a plaintiff who alleges a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments. The question is frivolous and completely devoid of merit.

The owners did not cite one authority for the proposition that it is not constitutionally permissible to sustain a general demurrer, or grant a motion to dismiss, in an inverse condemnation action. There is no provision in the California Code of Civil Proceduure or the Federal Rules of Civil Procedure (28 USC) that prohibits the use of such procedures in an inverse condemnation action. The function of a general demurrer is to test the legal basis of the action promptly and without the effort and expense of trial. Witkins, California Procedure, 2d Ed., Vol. 3, p. 2409, §796. If a Plaintiff cannot state facts sufficient to constitute a cause of action, he is not entitled to a trial. This Court has not hesitated to affirm a state court decision sustaining a general demurrer in an inverse condemnation action. (Eg. Agins v. Tiburon (1980), 447 U.S. 255, 6 L.Ed. 2d 106.) Question 3 is frivolous and does not merit this Court's consideration.

QUESTION 6 RAISED IN THE JURISDICTIONAL STATEMENT DOES NOT STATE A SUBSTANTIAL FEDERAL QUESTION.

Question 6 approaches but does not quite identify the issue properly before this Court. The issue is whether the City's refusal to rezone the property constituted a taking without just compensation in violation of the Fourth and Fifteenth Amendments of the United States Constitution. In view of the previous decisions of this Court, it is clear that the "facts at bench" do not constitute a "taking" of property.

The owners boldly state that the "facts at bench" establish that the "appellant's property was stultified by regulation into uselessness and worthlessness." This is a misstatement of the facts set forth in the Amended Complaint and the facts which the state courts properly judicially noticed. The owners' allegation that the refusal to rezone the property deprived them of the beneficial use of the property was not accepted by the state courts as true because the zoning ordinance allowed several uses of the property. Moreover, there was no allegation that the property was not suitable for development for uses allowed under A-2 zoning.

The crucial "facts at bench" are that the property was zoned A-2 at the time it was purchased, the property was located in the path of the runway, and there is no allegation that the property is not suited to the uses permitted.

The application of a zoning ordinance affects a taking only if the ordinance does not substantially advance a legitimate state interest, or denies the owner economically viable use of his property. Agins v. Tiburon (1980), 447 U.S. 255, 261, 6 L.Ed. 2d 106. Viewed in the light of this Court's opinion in the landmark case of Euclid v. Ambler Realty Co. (1926), 272 U.S. 365, 71 L.Ed. 303, the application of A-2 zoning to the owners' property is obviously a constitutional exercise of the state's police powers.

The owner's basic contention is that the City by refusing to rezone has deprived them of the profits that might have been realized if they were allowed to develop the property for high density commercial uses. This modest governmental action, which has not deprived the owner of property rights acquired at the time of purchase, does not constitute a "taking".

This Court has upheld land use regulations that promoted the health, safety, morals, or general welfare of the public even though the regulation "destroyed or adversely affected recognized real property interest." Penn Central Transportation Co. v. New York City (1978), 438 U.S. 104, 126, 57

L.Ed. 2d 631. (See Welch v. Swasey (1909), 214 U.S. 91, 53 L.Ed. 923, Goldblatt v. Hempstead (1962), 369 U.S. 590, 8 L.Ed. 2d 130, Nectow v. Cambridge (1928), 277 U.S. 183, 188, 72 L.Ed. 842, Gorieb v. Fox (1927), 272 U.S. 603, 71 L.Ed. 1228.)

In the landmark case of Pennsylvania Coal Co. v. Mahon (1922), 260 U.S. 383, 413, 67 L.Ed. 322, this Court stated:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.

That statement is of great significance to this case. If government was required to compensate property owners for loss of profits that may be realized if their property is rezoned to allow uses that are injurious to the community, the government's ability to enact progressive and enlightened land use regulations would be greatly diminished. The owners in the present case still possess the property rights acquired at the time the property was purchased. The only effect of the City's refusal to rezone the property is to deny the owners greater property rights than those acquired at the time the property was purchased.

In Mueller v. Kansas (1887), 123 U.S. 623, 668-669, the Court stated:

> A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any sense, be deemed a taking or an appropriation of property for the public benefit. Such legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict

> his right to dispose of
> it, but is only a
> declaration by the state
> that its use by anyone,
> for certain forbidden
> purposes, is prejudicial
> to the public interest....

The refusal to grant the application to rezone the property has not deprived the owners of any property rights acquired at the time of acquisition. The owners have been deprived of the right to develop the property for uses that would be injurious to the community. In light of the previous decisions of this Court, such facts do not constitute a "taking".

CONCLUSION

It is respectfully submitted that the owners have failed to raise a substantial federal question that was decided by the state courts. Therefore, the appeal must be dismissed.

Respectfully submitted,

MATTHEW L. HATFIELD, of
Counsel to
KOSTAS, EPSON & MILBURN
Attorneys for Respondent,
CITY OF PALMDALE

Appendix

Section 32.02 Principal Uses Permitted

Premises in Zone A-2 may be used for:

A. The following principal uses provided that all buildings or structures shall be located not less than fifty (50) feet from any street, highway or any building used for human habitation:

   1. Animal hospitals.
   2. Animal raising, including such animals as poultry, fowl, birds, rabbits, chinchilla, nutria, mice, frogs, fish, bees, earthworms and other similar animals of a comparable nature, form and size including hatching, fattening, marketing, sale, slaughter, dressing, processing, and packing, including eggs, honey or similar products derived therefrom.
   3. Animal training schools.
   4. Kennels, dog and cat.
   5. Veterinary offices.

B. The following principal uses:

   1. Camps, youth.
   2. Camp grounds, picnic areas, trails with overnight camping facilities, including fishermen's and hunters' camps but not including structures for permanent human occupancy.
   3. Crops, field, tree, bush, berry and row, including nursery stock, the growing of.

4. Dwellings, one-family.
5. Electric distribution and electric transmission substations including microwave facilities in conjunction therewith, provided such use is not established within fifteen hundred (1,500) feet of any public building, park, school or residential zone.
6. Mushroom farms.
7. Oil wells pursuant to the provisions of Article 91 (Regulation of Principal Uses Permitted).
8. Parking lots as a supplemental use on lots or parcels of land adjoining or across an alley from any commercial or manufacturing zone, pursuant to the provisions of Article 91 (Regulation of Principal Uses Permitted).

C. The following additional principal uses on a lot or parcel of land having an area of not less than five (5) acres:

1. Breeding farms for the selective or experimental breeding of cattle, sheep, or horses or the raising and training of horses or show cattle and sheep.
2. Community auction grounds, exclusively for the sale of agricultural products.
3. Livestock sales yards.
4. Logging operations, involving only the actual controlled cutting and removing of trees with no sawmill operations.

5. Raising of cattle, sheep, goats and horses.
6. Riding academies and stables with boarding of horses.

D. The following additional principal uses on a lot or parcel of land having an area of not less than ten (10) acres:

1. Dairies, including the processing and sale of dairy products from milk lawfully produced on the premises.
2. Livestock feed yards.
3. Manure, the spreading, drying and sale of, providing no shaking or pulverizing machinery is used in connection therewith.

E. Other similar uses which the Commission finds to fall within the intent and purpose of this Zone, will not be more obnoxious or materially detrimental to the public welfare or to property in the vicinity of said uses and which the Commission finds to be of a comparable nature and of the same class as the uses enumerated in this Section.

Section 32.03 Accessory Uses Permitted

Premises in Zone A-2 may be used for accessory uses, provided such uses are established on the same lot or parcel of land, are incidental to, and do not substantially alter the character of any permitted principal use, including but not limited to:

1. Accessory buildings or structures other than for the housing, nurture or confinement of animals including but not limited to:
    a. Private garages, carports and children's playhouses.
    b. Tool houses, lathhouses and greenhouses.
    c. Windmills, silos, tank houses, buildings or shelters for farm equipment or machinery, water wells, water reservoirs and storage tanks.
    c. Stands for the purpose of displaying and selling agricultural products lawfully produced on the property, subject to the following conditions:
        (1) Floor area shall not exceed three hundred (300) square feet.
        (2) Not to exceed one (1) stand on a lot or parcel of land.
2. Accessory buildings or structures required for the housing, nurture, confinement or storage of animals, lawfully permitted or produced on the premises, provided such buildings or structures are located not less than fifty (50) feet from any street, highway or any building used for human habitation or residential zone.
3. Accessory signs as permitted in subsection F of Section 32.06.
4. Building materials, storage of, used in the construction of a building or building project, during

construction and thirty (30) days thereafter, including the contractor's temporary office, provided that any lot or parcel of land so used shall be a part of the building project or on property adjoining the construction site.

5. A caretaker's residence, where the legally established use requires the continuous supervision of a caretaker or superintendent, if occupied only by such persons and their families.

6. Cattle, goats, hogs or sheep, not to exceed two (2) such animals on a lot or parcel of land having an area of not less than twenty thousand (20,000) square feet, providing a dwelling unit is located thereon, and that such animals are not kept or housed within fifty (50) feet of any street, highway or any building used for human habitation.

7 A guest house.

8. Horses on a lot or parcel of land having an area of not less than twenty thousand (20,00) square feet, provided that said horses are kept or maintained for the private use of members of the family residing on the premises, but in no event more than one (1) such horse for each ten thousand (10,00) square feet of lot area, and that such horses are not kept or housed within fifty (50) feet of any street, highway, or any building used for human habitation.

9. Pets, household, provided that not to exceed three (3) mammals over four (4) months of age are kept for each dwelling unit.

10. Wild animals as specifically provided herein:

The following being permitted, provided such animals are kept and maintained at a place where the keeping of domestic animals is permitted:

a. Alpacas
b. Anoas
c. Antelopes
d. Armadilloes
e. Badgers
f. Beavers
g. Camels
h. Canaries
i. Chamoises
j. Chinchillas
k. Chipmunks
l. Cockateels
m. Deer
n. Finches
o. Foxes
p. Giraffes
q. Gopher snakes
r. Guinea pigs
s. Hamsters
t. Hawks
u. Kangaroos
v. King snakes
w. Koalas
x. Llamas
y. Marmosett monkeys
z. Minks
aa. Otters
ab. Ostriches
ac. Parrots and other birds of the psittacine family
ad. Peacocks
ae. Porcupines

af. Prairie dogs
ag. Raccoons
ah. Reindeer
ai. Seals
aj. Squirrel monkeys
ak. Tropical fish excluding caribe
al. Turtles
am. Wallabies
an. White mice
ao. White rats
ap. Zebras
aq. Other similar animals which, in the opinion of the Commission, are neither more obnoxious or detrimental to the public welfare than the animals enumerated in this Section.

Section 32.04 Uses Subject to Director's Review and Approval

Premises in Zone A-2 may be used for the following purposes subject to review and approval by the Director, pursuant to the provisions of Article 105 (Site Plan Review):

1. Access to property lawfully used for purposes not permitted in Zone A-2, provided no other practical access to such property is available, and such access will not alter the character of the premises in respect to permitted uses in Zone A-2.

2. Christmas trees and wreaths, the sale of, between December 1 and December 25, both dates inclusive, to the extent permitted by other statutory and ordinance provisions. Any structures, facilities and materials used for the sale of

trees and wreaths shall be removed from the premises by December 31 of the same calendar year, and the property restored to a neat condition.

3. Colleges and universities, including appurtenant facilities, giving advanced academic instruction approved by the State Board of Education or other recognized accrediting agency, but excluding trade or commercial schools.
4. Communication equipment buildings.
5. Country clubs.
6. Day care for children, family home.
7. Electric distribution and electric transmission substations including microwave facilities in conjunction therewith, except as otherwise provided in Section 32.02.
8. Fishing and casting ponds.
9. Golf courses.
10. Homes for aged persons, foster family.
11. Homes for children, foster family.
12. Microwave stations.
13. Parks, playgrounds and beaches, publicly owned, with all appurtenant facilities customarily found or permitted in conjunction therewith.
14. Riding and hiking trails.
15. Schools, through grade twelve (12), accredited, including appurtenant facilities, which offer instruction required to be taught by the Education Code of the State of California, in which no pupil is physically restrained, but excluding trade or commercial schools.

16. Ski lifts, tows, runs and warming huts.
17. Storage, temporary, of materials and construction equipment used in construction or maintenance of streets and highways, sewers, storm drains, underground conduits, flood control works, pipe lines and similar uses.
18. Telephone Repeater stations.

Section 32.05 Uses by Conditional Use Permit

Premises in Zone A-2 may be used for the following purposes, provided a permit has first been obtained, pursuant to the provisions of Article 102 (Variances and Conditional Use Permits):

1. Agricultural workers' living quarters, for persons employed and deriving the major portion of their income from employment on the premises.
2. Airports.
3. Bus terminals, storage and rental.
4. Cemeteries.
5. Churches, temples or other places used exclusively for religious worship, pursuant to the provisions of Article 94 (Regulation of Uses Established by Conditional Use Permit).
6. Circus winter quarters.
7. Convents and monasteries.
8. Correctional institutions including jails, farms and camps.
9. Day care for children, special home.
10. Day nurseries, children.

11. Electric generating plants, including microwave facilities in conjunction therewith.
12. Fairgrounds of a public character, when permanently located, including such commercial uses as are normally accessory or appurtenant thereto.
13. Farm equipment repair shops.
14. Farm labor camps, established to serve as temporary housing for migrant and temporary workers and their immediate families.
15. Fertilizer plants.
16. Fire stations.
17. Fruit and vegetable packing plant.
18. Gas measurement stations.
19. Golf driving ranges.
20. Guest ranches.
21. Heliports.
22. Helistops.
23. Hog ranches.
24. Homes for aged persons, small group care.
25. Homes for children, special boarding.
26. Hospitals.
27. Institutions for aged persons, private.
28. Institutions for children, private.
29. Land reclamation projects pursuant to the provisions of Article 94 (Regulation of Uses Established by Conditional Use Permit).
30. Libraries.
31. Lodge halls.
32. Menageries.

33. Mobilehome parks pursuant to the provisions of Article 94 (Regulation of Uses Established by Conditional Use Permit).
34. Museums.
35. Nursery schools, pre-school children.
36. Observatories.
37. Police stations.
38. Post office.
39. Private clubs.
40. Public utility service centers.
41. Race tracks.
42. Radio and television stations and towers, but not including studios.
43. Revival meetings, tent.
44. Rifle, pistol or skeet ranges.
45. Road construction and maintenance yards.
46. Rodeos.
47. Sawmills, only in conjunction with logging operations.
48. Solid fill projects.
49. Theaters, drive-in.
50. Water reservoirs, dams, treatment plants, gaging stations, pumping stations, and any use normal and appurtenant to the storage and distribution of water, other than as provided in Section 32.03.
51. Wild animal exhibitions.
52. Wild animals, the keeping of either individually or collectively for private or commercial purposes except as otherwise provided in Section 32.03.
53. Zoos.

IN THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA, FOR THE COUNTY
OF LOS ANGELES

ROBERT J. GILLILAND,

Plaintiff,

vs.

CITY OF PALMDALE,

Defendant.

Case No. C 107092

AMENDED COMPLAINT FOR INVERSE CONDEMNATION

Plaintiff (hereafter Property Owner) alleges:

1

Defendant City of PALMDALE (hereafter City) is a municipal corporation organized and existing under the laws of the State of California.

2

Property Owner is the owner of the following described real property (hereafter subject property):

Parcel 25 in the City of Palmdale, per map recorded in Book 65, page 19 of Record of Survey, Los Angeles County Recorder's office.

The subject property contains some 5 acres of vacant land. Property Owner has owned the subject property for 9 years since 1965.

3

At all times pertinent hereto, the subject property has been located within the City of Palmdale and as such has been within the zoning and planning jurisdiction of the City.

4

The subject property is, and at all times pertinent hereto was, zoned A 2-5, which zoning under the City of Palmdale Zoning Ordinance is an Agricultural Zone. A 2-5 zoning permits single family residential use on the basis of two residences for each five acres of property.

5

The A 2-5 zone is used by the City of Palmdale as a "holding zone". A "holding zone" is a zone where the land is held to minimal use as a means of keeping control of land use in the City of Palmdale beyond the usual zoning control. When an owner of land in a "holding zone" comes to the City of Palmdale for permission to use his land for its highest and best use, the City of Palmdale is in a position, by the minimal use permitted in the "holding zone," to exercise precise use control by withholding zone change unless the City of Palmdale approves the specific land use, site utilization and sometimes aesthetics of the use to be made of the land.

6

Real property taxes have been assessed to and paid by Property Owner not based upon A 2-5 uses permitted, but instead upon recognition of the "holding zone" status and the highest and best uses for which the land is adapted.

7

The assessed value and the resulting real property taxes of the subject property from the time of its purchase in 1965 through the tax year 1972-73 has increased 1367%. This tax increase is due to increased commercial and industrial development of the area surrounding the subject property. (See Photo, Exhibit "A").

8

As a further result of the increased development, Property Owner was requested and did grant easements and dedicate portions of the subject property for purposes of urbanization including street widening, curbing, drainage and utilities.

9

In January, 1973, Property Owner applied to the Palmdale Planning Commission for a zone change of the subject property to CPD, a commercial planned development zone.

10

On January 19, 1973, the Palmdale Planning Commission, by a vote of 5 to 0, voted in favor of Property Owner's request.

11

On May 11, 1973, Property Owner's request for zone change came on for hearing before the City Council of the City of Palmdale. Testimony in opposition to the zone change came from a representative of Air Force Plant 42 and a representative on behalf of the civilian contractors at Air Force Plant 42. By a vote of 3 to 1, the City Council voted to deny Property Owner's request for a zone change based on the subject property's proximity to runways at Air Force Plant 42.

12

Air Force Plant 42 is a joint civilian-military airport with commercial manufacturing conducted on the premises. The Lockheed plant located adjacent to Air Force Plant 42 is reputed to be the largest building ever constructed in California. The Lockheed plant, which assembles the Lockheed L 1011, the jumbo air bus, alone employs 3,900 people.

13

The Refusal to grant a rezoning to conform to the highest and best use, and indeed the only economically feasible use, was for the purpose of devoting the subject property to a public use, to wit, a clear zone and a buffer zone for runway 4-approach, 22 departure, of Air Force Plant 42. (See Map, Exhibit "B").

14

By reason of the refusal to rezone by City, Property Owner's private property has been unlawfully taken and damaged for public use without just compensation and without due process and equal protection of the laws to which Property Owner is entitled by the United States and California Constitutions.

15

As a result of the refusal to

permit the commercial use for which the subject property is adapted and had dedicated land to prepare for, Property Owner has been deprived of beneficial use of the subject property, to wit: the use, enjoyment, right to develop and sell the subject property.

16

Property Owner is informed and believes and on such ground alleges that the acts of the City alleged above, were intended by the City to stultify the lawful use of Property Owner's land, to reduce the value thereof, to render it unsalable and unusable for any reasonable private uses, and thereby to accomplish a de facto transformation of said private land into public property in order to devote the property to a public use without payment of just compensation. Said conduct of the City was unreasonable, unlawful, arbitrary and discriminatory.

17

By reason of the above acts of City, Property Owner has been damaged in an amount in excess of $325,000.00.

18

Prior to filing this action, Property Owner duly filed a timely claim with the City, which claim was rejected in writing on June 14, 1974.

WHEREFORE, Property Owner prays that:

1. Just compensation for the taking and damaging of his property be ascertained by a jury; for

2. All costs of litigation, including attorneys' and expert fees;

3. Costs of suit; and

4. Such other relief as the Court deems just.

FADEM BERGER & STOCKER

By
PATSY HUMISTON CARTER
Attorney for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am a resident of the county aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 8383 Wilshire Boulevard, Beverly Hills, California 90211.

On April 14, 1975, I served the within AMENDED COMPLAINT for INVERSE CONDEMNATION on the INTERESTED PARTIES in said action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at BEVERLY HILLS, CALIFORNIA addressed as follows:

JAMES S. KOSTAS, ESQ.
City Attorney of the City of Palmdale
1305 E. Palmdale Boulevard
Palmdale, California 93550

I declare, under penalty of perjury, that the foregoing is true and correct. Executed on APRIL 14, 1975 at BEVERLY HILLS, California.

DARLENE ROBERTS

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

ROBERT J. GILLILAND,

Plaintiff,

vs.

THE CITY OF PALMDALE,

Defendant.

Case No. C 107 092
Filed September 12, 1979

JUDGMENT ON THE PLEADINGS

The motion of Defendant for a judgment on the pleadings came on regularly for hearing on July 18, 1979. Jerrold A. Fadem appeared as counsel for Plaintiff, and A. Donald Long appeared as counsel for Defendant. After said hearing a minute order was entered granting said motion without leave to amend. The Court having reviewed and considered the pleadings and outline of evidence as presented by counsel for

Plaintiff, rules that there has been no taking or damaging of Plaintiff's property.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff take nothing and that Defendant not recover its costs herein.

Dated: Sept. 12, 1979

/S/Thomas W. LeSage
Judge of the Superior
Court

In the Court of Appeal of the State of California, Second Appellate District, Division One.

Robert J. Gilliland,
Plaintiff and Appellant,
vs.
The City of Palmdale, a municipal corporation,
Defendant and Respondent.

2d Civ. No. 59028,
Super. Ct. No. C107092.
Filed December 7, 1981.

APPEAL

APPEAL from judgment of the Superior Court of Los Angeles County. Thomas W. Le Sage, Judge. Affirmed.

Fadem, Berger & Norton, Michael M. Berger, for Appellant.

Kostas & Epson, James S. Kostas, for Respondent.

Plaintiff appeals from a judgment on the pleadings without leave to amend. Our review of such judgment is controlled by time-honored rules of law. A motion for judgment on the pleadings performs the function of a general demurrer (*Tiffany v. Sierra Sands Unified School Dist.* (1980) 103 Cal.App.3d 218, 222): it tests the sufficiency of the complaint to state a cause of action. (*Id.*, at pp. 224-225.) Like a demurrer it is confined to the face of the pleading under attack and admits all material and issuable facts pleaded. (*Id.*, at p. 225.) Accordingly, we shall assess the legal adequacy of the following facts drawn from plaintiff's complaint and accepted as true.

FACTUAL BACKGROUND

In 1965 plaintiff became the owner of five acres of vacant land in the defendant City of Palmdale (hereafter the property) which were located in the path of a takeoff and approach runway at Air Force Plant 42, a joint civilian-military airport. At the time that plaintiff acquired the property it was zoned "A-2." According to the Palmdale zoning ordinance, of which we take judicial notice (Evid. Code, § 452(b); ***Baillargeon v. Dept. of Water and Power*** (1977) 69 Cal.App.3d 670, 676), the classification A-2 was "established for use on land suited for agricultural purposes and other open land uses . . . [t]he basic intent of this Zone [is] to encourage and support the development of agricultural pursuits. To further this purpose limitations are imposed on incompatible and conflicting urban uses." (Ord. No. 140, ch. 3, art. 32, zone A-2, § 32.01). Permissible uses of the land thus zoned include: one-family dwellings; animal hospitals, schools and kennels and veterinary offices; youth camps and other camp grounds; crops; auction grounds; stock breeding and yards; riding academies and stables. The A-2 zoning category functioned as a holding zone, so-called, such that applications for a zone change from A-2 were subject to particularly careful and detailed scrutiny in respect of the uses that would occur under the change.

In January 1973 plaintiff applied to the Palmdale Planning Commission for a zone change to a "commercial planned development" zone. On January 19, 1973, the Planning Commission voted five to zero in favor of plaintiff's requested zone change. On May 11, 1973, plaintiff's request was heard before the Palmdale City Council. A representative of Air Force Plant 42 and a representative of the civilian contractors at Air Force Plant 42 testified in opposition to plaintiff's requested zone change. The City

Council voted three to one against plaintiff's requested zone change based on the proximity of the property to runways at Air Force Plant 42. As a result of the City's refusal to rezone his property as requested, plaintiff suffered damages of more than $325,000.

On April 15, 1975, plaintiff filed in superior court an "amended complaint for inverse condemnation," alleging all the above facts which we accept as true for purposes of reviewing the judgment. Plaintiff further alleged that his private property had "been unlawfully taken and damaged for public use without just compensation and without due process and equal protection of the laws to which [he was] entitled by the United States and California Constitutions." The complaint contained additional conclusionary allegations which we discount as surplusage. 1/

1/ Paragraphs 13, 15 and 16 alleged, *inter alia*, that the refusal was for the purpose of devoting the property to public use as a clear zone; that plaintiff had been deprived of the beneficial and only economically feasible use of his property; that the City intended a *de facto* transformation of the property into public property without paying just compensation. We discount the allegations of motive implicit in these paragraphs on the further ground that ". . . the purpose or motive of the city officials in passing an ordinance is irrelevant to any inquiry concerning the reasonableness of the ordinance. . . . If the conditions justify the enactment of the ordinance, the motives prompting its enactment are of no consequence.' (Citation.)" (*Pinheiro v. County of Marin* (1976) 60 Cal.App.3d 323, 327-328.) Similarly, under federal law, motive is irrelevant. "'. . . the Constitution measures a taking of property not by what a State says, or . . . intends, but by what it does.' (Citations.)" (*San Diego Gas and Electric Co. v. San Diego* (1981) ____ U.S. ____, [67 L.Ed.2d 551, 573] (dis. opn. Brennan, J.).) Thus, even if we accepted these allegations of motive as true, they would not bear on our determination of whether the challenged regulation "took" plaintiff's land.

(*Agins v. City of Tiburon* (1979) 24 Cal.3d 266, fn.2 (dis. opn. Clark, J.); *Hecton v. People ex. rel Dept. of Transportation* (1976) 58 Cal.App.3d 653, 657; *6th Camden Corp. v. Evesham Tp., Burlington Cty.* (D. N.J. 1976) 420 F.Supp. 709, 720.)

On March 14, 1979, the California Supreme Court decided *Agins v. City of Tiburon, supra*, 24 Cal.3d 266, and held that the remedy of inverse condemnation was not available to a landowner aggrieved by the negative impact of a zoning regulation on his property rights. Such a plaintiff was limited, the court held, to mandamus or declaratory relief to redress the government's excessive exercise of its police power to regulate land use. On the plaintiff's action for declaratory relief, the court held as a matter of law that no taking of plaintiff's land had occurred through enactment of the zoning regulation in question. (*Id.*, at pp. 277-278.)

On July 17 and 18, 1979, the motion of defendant City of Palmdale for judgment on the pleadings was argued in the trial court. On July 18, 1979, the court granted defendant's motion, noting in its minute order, "The Court, having reviewed and considered the pleadings and outline of the evidence as presented by counsel for the plaintiff, finds that there has been no taking or damaging of property." 2/

2/ The trial court's consideration of the "outline of evidence as presented by counsel for the plaintiff" was obviously impermissible when deciding the motion for judgment on the pleadings, as the motion is directed to the face of the pleading. (4 Witkin, Cal. Procedure (2d ed. 1971) p. 2817.) On review we limit ourselves to examination of the face of the pleading and affirm if the trial court was correct within that proper focus. (*Cf. Friendly Village Community Assn. Inc. v. Silva & Hill Constr. Co.* (1973) 31 Cal.App.3d 220, 224.) No doubt the trial court's consideration of the outline of

(continued)

On June 10, 1980, the United States Supreme Court decided the appeal of ***Agins, supra***, from the California Supreme Court and affirmed the holding that the zoning regulation in question did not take the plaintiffs' property without just compensation. (***Agins v. Tiburon*** (1980) 447 U.S. 255.) But because no taking had occurred the court did "not consider whether a State may limit the remedies available to a person whose land has been taken without just compensation." (***Id.***, at p. 263.)

On June 25, 1981, plaintiff filed his opening brief in this court, announcing in his introduction, "This case seeks enforcement of rights under the U.S. Constitution (Fourteenth Amendment) and the federal Civil Rights Act (42 U.S.C. § 1983)."

DISCUSSION OF THE LAW

Notwithstanding plaintiff filed this case six and a half years ago as a complaint for inverse condemnation, his characterization of the action on appeal is accurate. The complaint invokes plaintiff's rights under the United States Constitution and specifically alludes to rights protected by the Fifth and Fourteenth Amendments thereto. All that is required to bring a claim under the federal Civil Riqhts Act (42 U.S.C. § 1983) is an allegation that one has been subjected by any form of state action to the deprivation of any right secured by the Constitution of the United States, 3/

2/ (continued) evidence pertained to its decision whether to grant leave to amend, whether plaintiff could cure by amendment the defects on which the motion would be granted.

3/ 42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any (continued)

(*Gomez v. Toledo* (1980) 446 U.S. 635, 640.) There is no want of federal civil rights cases in which the gravamen of the claim is a taking of private property without just compensation in violation of the Fifth and Fourteenth Amendments, such as plaintiff has asserted. (*See, e.g., Hernandez v. City of Lafayette* (5th Cir. 1981) 643 F.2d 1188; *Gorman Towers, Inc. v. Bogoslavsky* (8th Cir. 1980) 626 F.2d 607; *Barbaccia v. County of Santa Clara* (N.D. Cal. 1978) 451 F.Supp. 260; *Dahl v. City of Palo Alto* (N.D. Cal. 1974) 372 F.Supp. 647.) An action under the federal Civil Rights Act can be brought in state court (*Martinez v. California* (1980) 444 U.S. 277; *Williams v. Horvath* (1976) 16 Cal.3d 834, 837; *Brown v. Pitchess* (1975) 13 Cal.3d 518, 520-523), and can be brought against a municipality (*Monell v. Department of Social Services* (1978) 436 U.S. 658, 690.) Altogether we perceive no obstacle to treating this case on appeal as such an action.

When a federal civil rights action, or other federally created cause of action, is brought in state court, the vindication of that right cannot be frustrated by state law. (*Williams v. Horvath, supra*, 16 Cal.3d at 841.) In matters of substance the law of the jurisdiction creating the right will control; in other words, federal substantive case law should be applied. (*Cf. Central Vermont Railway Co. v. White* (1915) 238 U.S. 507, 511.)

Thus, the chief benefit of viewing his complaint in a civil rights perspective is avoidance of the devastating effect of the California Supreme Court holding in *Agins v. City of*

[3/] (continued) citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other property proceeding for redress."

Tiburon, supra, 24 Cal.3d 266. Following *Agins* the remedy of inverse condemnation with its imposition of money damages no longer exists in California law. (*Id.*, at p. 272.) A zoning regulation, no matter how unreasonable or severe its impact on a landowner's property rights, can never effect a "taking" within the meaning of the Just Compensation Clause of either the United States or California Constitutions. It must be regarded as an excessive exercise of the police power from which the injured landowner must seek relief by mandamus or declaratory action to have it set aside. (*Ibid.*)

California's position flatly contradicts clear precedent of United States Supreme Court cases. Although the United States Supreme Court since the California *Agins* has twice on a procedural or technical basis declined to reach the issue and resolve the conflict (*Agins v. Tiburon, supra*, 447 U.S. 255 and *San Diego Gas and Electric Co. v. San Diego*, (1981) __ U.S. __ [67 L.Ed.2d 551]), Justice Brennan in his dissenting opinion in *San Diego Gas and Electric*, joined by three members of the Court, has thoroughly analyzed it. Reviewing the United States Supreme Court cases on inverse condemnation, he points out that the Supreme Court regularly hears cases to settle on the particular facts whether a taking that triggers payment of just compensation has been effected by an exercise of the police power through a zoning ordinance or other land use restriction. (*Id.*, at pp. 572-573.) The court thus clearly assumes such a possibility. (*See, e.g. Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104; *Goldblatt v. Town of Hempstead* (1962) 369 U.S. 590.) Dicta abound in these cases on the standards by which such a determination should be made. In *Agins, supra*, 447 U.S. at 260-261, for instance, the court stated, "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see ***Nectow v. Cambridge***, 277 U.S. 183, 188 (1928), or denies an owner economically viable use of his land, see ***Penn Central Transp. Co. v. New York City***, 438 U.S. 104, 138, n. 36 (1978). The determination that governmental action constitutes a taking is, in essence, a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. Although no precise rule determines when property has been taken, see ***Kaiser Aetna v. United States***, 444 U.S. 164 (1979) the question necessarily requires a weighing of private and public interests."

While Justice Brennan's conclusion — that government action in the form of a police power regulation can effect a taking just as surely as eminent domain, and the Constitution demands then that just compensation be paid — awaits another vote before it invalidates the California Supreme Court holding of ***Agins, supra***, there is no question that the federal law accepts in theory the remedy of inverse condemnation with its imposition of money damages for a "taking" effected through a zoning regulation. Plaintiff herein, therefore, is not out of court on a judgment on the pleadings for the reason that the remedy he seeks has been abolished in state law.

While plaintiff's suit remains viable under the Civil Rights Act as to the remedy it seeks, it is no less susceptible as a civil rights action to judgment on the pleadings for failure to state a cause of action, or as it is termed in federal parlance, "a claim upon which relief can be granted." (Fed. Rules Civ. Proc., rule 12(b)(6), 28 U.S.C.) Contrary to plaintiff's interpretation of the trial court's ruling as reflected in his brief arguing for application of federal law, the wording of the judgment below indicates the trial court granted the motion because the facts alleged failed to show any "taking," not because it failed to apply federal law. It is immaterial of course on what grounds the trial court granted judgment on the pleadings if that was the correct decision. (***Apelian v. County of Los Angeles*** (1968) 266 Cal.App.2d 550, 554, disapproved on another point in ***Sullivan v. County of Los Angeles*** (1974) 12 Cal.3d 710, 722.) We think it was.

We acknowledge and apply the federal policy that a civil rights pleading should be liberally construed; that ". . . a § 1983 complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. (Citation.)" (***Shaw v. Briscoe*** (5th Cir. 1976) 541 F.2d 489, 490, *cert. den.* 430 U.S. 933.) We acknowledge and are willing to apply, if this were an appropriate case, the wisdom of federal "taking" cases according to which there is no "set formula to determine where regulation ends and taking begins" (***Goldblatt v. Town of Hempstead, supra***, 369 U.S. 590, 594); and the determination is one of reasonableness that entails "ad hoc, factual inquiries" (***Penn Central Transportation Co. v. New York City, supra***, 438 U.S. 104, 124), resolution of which is inappropriate on a motion to dismiss. (***M.J. Brock & Sons, Inc. v. City of Davis***, (N.D. Cal. 1975) 401 F.Supp. 354, 358; ***Dahl v. City of Palo Alto***, (N.D. Cal. 1974) 372 F.Supp. 647, 648.) Even so, plaintiff's facts, construed as liberally as possible, indeed taken as true, when evaluated by the standards that the federal cases have evolved, beyond doubt could not make out a "taking" and do not warrant a trial on the merits.

The crucial features of plaintiff's situation are that both at the time that he acquired the property and at the time that he brought the lawsuit, the property was both located in the path of the Air Force runway and zoned A-2. The only intervening government action was the City's refusal to rezone on plaintiff's request to enable him to develop the property for commercial use. If, as plaintiff interprets the situation, the City, by permitting only low density agricultural use of the property, in effect has devoted the property to the use of the Air Force or to the public as a clear zone at the end of the Air Force runway, then it had already done so when he acquired the property. The City by refusing to rezone has not deprived him of any property interest that he ever had. Rather, in a more accurate perspective, the City has refused to give him a greater property interest than he acquired.

Plaintiff's claim of a government taking under these circumstances is uniquely slim, as far as we can tell from the cases. The more familiar fact situation, in which a motion for judgment on the pleadings or to dismiss has been denied, presents the affirmative enactment of a zoning change or the adoption of a general plan by the government entity which limits the plaintiff's economic exploitation of the property affected. (*See, e.g., Sanfilippo v. City of Santa Cruz* (N.D. Cal. 1976) 415 F.Supp. 1340 [motion to dismiss denied when plaintiffs alleged that zoning of their land was changed from a residential classification permitting one residence per 2.5 acres to a category permitting one residence per 100 acres and plaintiffs' subsequent application for rezoning and approval of a planned unit development was denied]; ***M.J. Brock & Sons v. City of Davis, supra***, 401 F.Supp. 354 [motion to dismiss denied when plaintiff pleaded misleading and encouraging actions by defendants regarding plaintiff's development plans followed by a downzoning from high density residential to agricultural to a total ban on construction].)

In the few cases where the nature of the alleged "taking" has been the refusal to rezone land that remained zoned as it was when plaintiff acquired it, such as plaintiff has asserted herein, there were additional circumstances before the court that justified not disposing of the case without trial. In ***6th Camden Corp. v. Evesham Tp., Burlington Cty., supra***, 420 F.Supp. 709, plaintiff acquired 20 acres, 17.9 of which were zoned for business and 2.1 of which, landlocked with the 17.9, were zoned residential. Plaintiff planned to construct a shopping center on the entire acreage, but defendants refused to rezone the 2.1. Plaintiff claimed the 2.1 had been rendered useless and unconstitutionally "taken" by the zoning for residential use. The court denied a motion to dismiss, even though aware that a mere diminution in value would not prove a "taking." The court took judicial notice of a state court opinion that the 2.1 acres could not feasibly be used for the permitted use. Similarly in ***Hernandez v. City of Lafayette, supra***, 643 F.2d 1188, plaintiff's land had been zoned single family residential for ten years when he requested rezoning to a business or multi-family residential use. The Court of Appeals, reversing a summary judgment erroneously granted on the defendants' claim of immunity, noted that there were genuine issues of material fact whether the refusal to rezone constituted a taking because of summary judgment evidence that the land was not feasible for the use permitted (adjacent to sewage treatment, flood plain extending across parts of it) and because of questions of good faith in defendants' processing of plaintiff's rezoning application. (*Id.*, at p. 1200.)

In the instant case there is no allegation that plaintiff's land is not suited to the uses which are permitted, nor any allegation of governmental action beyond the straightforward adherence to the agricultural zoning which came with the property. When this modest governmental action, which has deprived plaintiff if not of his property at least of his profit in the amount of $325,000, is measured against the criteria of a "taking" enunciated by the Supreme Court and that applied by the lower federal courts, it appears " 'to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.' [Citations]." (*6th Camden Corp, v. Evesham Tp., Burlington Cty., supra*, 420 F.Supp. 709, 720, emphasis omitted.)

The criteria are two: ". . . if the ordinance does not substantially advance legitimate state interests, [citation] or denies an owner economically viable use of his land [citation]." (*Agins v. Tiburon, supra*, 447 U.S. 255, 260.) It is plaintiff's burden to prove that the ordinance meets these criteria if a "taking" by the ordinance is to be found. This is a heavy burden in view of the presumption of validity that attaches to the exercise of the public zoning authorities. (*See Burns v. City of Des Peres* (8th Cir. 1976) 534 F.2d 103, 108, *cert. den.* 429 U.S. 861.)

The interests of the City of Palmdale in the health and welfare of its citizens would appear to be well served by maintaining open land and low density agricultural land uses in the entire vicinity of the airport and especially in the direct path of the planes' takeoff and approach where plaintiff's property is situated. There being no allegations by plaintiff to the contrary, we find the A-2 zoning of plaintiff's land to be a reasonable exercise of the police power to protect the community from the excessive noise, air pollution and above average safety hazards that attend the concentration of air traffic in the zoned area.

Plaintiff claims that the refusal to rezone his land for commercial development denies him the "beneficial" and "only economically feasible" use of his land. The legal question, however, is whether it denies him "economically viable use" (*Agins, supra*, 447 U.S. 255, 260) within the meaning of that concept as developed in the federal cases.

It is well established that a mere "diminution in value" does not amount to such a denial. (***Goldblatt v. Town of Hempstead, supra***, 369 U.S. 590, 594; ***Hadacheck v. Sebastian*** (1915) 239 U.S. 394, 408-409 [diminution from $800,000 to $60,000 upheld].) Moreover, ". . . the mere fact that the regulation deprives the property owner of the most profitable use of his property is not necessarily enough. . . ." (***United States v. Central Eureka Mining Co.*** (1958) 357 U.S. 155, 168.) Indeed, "[f]or there to be a taking the landowner must show he has been deprived of all reasonable uses of his land" (***C.F. Lytle Co. v. Clark*** (10th Cir. 1974) 491 F.2d 834, 838); that it has been rendered valueless. (***Steel Hill Development, Inc. v. Town of Sanbornton*** (lst Cir. 1972) 469 F.2d 956, 963, *cert. den.* 414 U.S. 932.)

Whatever conclusions plaintiff may have alleged in his complaint, he has not alleged facts that show that the A-2 zoning denies him all reasonable or "economically viable" uses, as did the plaintiff in ***Hernandez v. City of Lafayette, supra***, 643 F.2d 1188; he has not alleged that the land is not suited to the uses for which it is zoned. The ordinance permits any number of uses, such as crops, livestock, animal facilities, which are not only reasonable but valuable and essential to a healthy, diversified community economy.

As analyzed by the standards of the federal "taking" cases, the A-2 zoning of plaintiff's land does not deprive him of the property rights protected in the Fifth and Fourteenth Amendments to the United States Constitution. No set of facts that plaintiff could prove would entitle him to relief under the federal Civil Rights Act.

The judgment on the pleadings without leave to amend is affirmed.

NOT FOR PUBLICATION.

JAKES, J.*

We concur:

SPENCER, P. J.
DALSIMER, J.

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* Assigned by the Chairperson of the Judicial Council.

Appellant's Reply Brief

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No. 81-1700

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October Term, 1981

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CITY OF PALMDALE and COUNTY OF LOS ANGELES,

Appellees.

APPEALS FROM
COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION ONE

APPELLANTS' REPLY TO MOTIONS TO DISMISS OR AFFIRM

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NEITHER PALMDALE NOR THE COUNTY DENIES CALIFORNIA'S DEFIANCE OF THIS COURT'S INVERSE CONDEMNATION DECISIONS, OR THE NATIONAL ANARCHY AMONG STATE COURTS ON WHAT CONSTITUTES A TAKING UNDER THE FEDERAL CONSTITUTION AND THE APPROPRIATE REMEDY THEREFOR.

It is interesting that neither of the motions to dismiss addresses the important issues presented by this case:

- the California judiciary's deliberate disregard for this Court's interpretation of a "taking," and the remedy therefor, within the meaning of the 5th and 14th Amendments (see JS 10-19); [1]

- the national anarchy among state courts as to what constitutes a "taking" within the meaning of the 5th and 14th Amendments (see JS 19-25); and
- the national anarchy among state courts as to the appropriate remedy for a "taking" (see JS 25-27).

Rather, they prefer to distort the facts and then assert that the distorted facts do not allege a taking (see p. 3, herein), or assert erroneously that the compensation issue was not decided below (County 12-13). [2]

It is apparent, however, that the compensation issue was an important part of the case in the California courts. Recall that the two Court of Appeal opinions disagreed on the issue: the ***County*** opinion concluded that there could be no compensation (JS, App. D, p. D-8), while the ***Palmdale*** opinion concluded that compensation was mandated by this Court's decisions if a taking were proved, notwithstanding contrary holdings of the California Supreme Court (JS, App. A, p. A-8). The California Supreme Court resolved this conflict in published precedent by "de-publishing" the ***Palmdale*** opinion (JS, App. G).

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[1] The Jurisdictional Statement is cited herein as "JS."

[2] The County's Motion to Dismiss will be cited "County [page no.];" Palmdale's will be cited "Palmdale [page no.]."

The issue was squarely presented and ruled upon. It merits this Court's attention.

PALMDALE AND THE COUNTY REFUSE TO DEAL WITH THE FACTS ALLEGED.

A significant clue to the weakness of the municipal position at bench is the refusal of Palmdale and the County to deal with the facts alleged.

Both agencies insist on saying that the Property Owners were seeking a change to a *more* valuable zone to *increase* the *profits* they could make from their property (County 2, 6, 7, 8; Palmdale 18, 19-21).

But that is not the case. The complaints are attached to the respective Motions to Dismiss. They show that the Property Owners were seeking relief from zoning actions which rendered their property worthless. It was not excess profit which they sought, but some viable use for the land.

The complaints allege that the governmental action stultified the use of the property and rendered it unusable and unsaleable (County, App. A, p. 4; Palmdale, App. B, p. B-8). These actions deprived the Property Owners of the only economically feasible use of the property (Palmdale, App. B, p. B-7), resulting in an unconstitutional taking (Palmdale, App. B, pp. B-7, B-8; County, App. A, pp. 3-4).

The function of the A2-5 holding zone was changed. That was a rezoning in fact. Only the A2-5 name remained the same.

On the *actual* facts, a taking is alleged.

THIS IS A *FEDERAL* CASE. THE DECISIONS BELOW CONFLICT WITH FEDERAL DECISIONS ON WHAT CONSTITUTES A TAKING AND HOW TO PLEAD A TAKING.

Inexplicably, the County asserts that the decisions at bench rest on *state* law (County 1).

Both opinions belie that assertion, demonstrating that the decisions rest on interpretations of *federal* law (JS, App. A, p. A-5 [*Palmdale*]; JS, App. D, pp. D-6, D-7 [*County*]). And, of course, the fountainhead of this stream of California law, ***Agins v. City of Tiburon*** (1979) 24 Cal.3d 266, 157 Cal.Rptr. 372, 598 P.2d 25, *aff'd on other grounds*, 447 U.S. 255 (1980), purported to be applying federal law, though it erroneously rejected the federal remedy, i.e., compensation.

Thus, the question is whether the complaints are sufficient as a matter of federal pleading law to state a claim for an unconstitutional taking of property.

The allegations required by the federal courts (including this Court, in ***Lake Country Estates v. Tahoe Reg. Plan. Com.*** [1979] 440 U.S. 391) are discussed at JS 23-25. They have often been conclusory in nature, leaving specificity to discovery and trial. (*See, e.g.*, ***Jacobson***, alleging simply that the rezoning constituted a taking; ***6th Camden Corp. v. Evesham Township*** [D. N.J. 1976] 420 F.Supp. 709, 713, alleging that the township's actions rendered the property sterile and useless.)

Once such allegations have been presented, this Court has repeatedly indicated a preference for individual fact examination, viewing each case as a *sui generis, ad hoc* investigation into fairness. (***San Diego Gas & Elec. Co. v. City of San Diego*** [1981] 450 U.S. 621, fn.15; ***United States v. Sioux Nation*** [1980] 448 U.S. 371, 409 fn.26; ***Kaiser Aetna v. United States*** [1979] 444 U.S. 164, 175; ***Andrus v. Allard*** [1979] 444 U.S. 51, 65; ***Penn. Central Transp. Co. v. City of New York*** [1978] 438 U.S. 104, 123-124; *see* ***Agins v. Tiburon*** [1980] 447 U.S. 255, 261, 263.)

Contrary to the intimations of both Palmdale and the County (Palmdale 15; County 6), there is nothing in this Court's ***Agins*** decision which supports disposing of this case by demurrer.

This case is not factually like ***Agins***. The difference is that the ***Agins*** property was zoned for its highest and best use. The zoning permitted up to five single family residences, and the owners wanted to build five single family residences. The owners believed (without applying) that they would not be permitted to do so. This Court felt that it could not conclude there had been a taking because the property was zoned for the use the owners wanted, and that use had not been denied by the City.

Here, however, the property is zoned for *no* viable use. Palmdale and the County designedly zoned the property for no viable use so that strict control could be exercised over specific projects. The A2-5 zone was *not* placed on the subject property because the A2-5 uses *were* appropriate, but because they were *not*. 3/ That way, the property could be held unused until Palmdale or the County approved a specific plan. (See JS 6-7.)

3/ The County's tax assessor understood the nature of the holding zone. That's why the property was *taxed* as commercial property, not agricultural property.

Moreover, here — again, unlike *Agins* — the Gillilands and Mrs. Fitz *did* apply to Palmdale and the County to use their property. They did what the holding zone anticipated: they applied to *change* the zone to permit the property's use. The problem is that in 1973 Palmdale and the County reneged and refused to act as to holding zone property as they always had. This change of governmental position in 1973 is not — in reality — a denial of rezoning, but a downzoning. The actions of Palmdale and the County downzoned the property from "holding" to "agricultural." Under settled federal law, a downzoning which destroys the value of property may be an unconstitutional taking. (See cases cited at JS 20-22.)

Moreover, viewed as a denial of rezoning, rather than a downzoning, a claim is still properly stated. At page 7 of its motion, the County boldly asserts:

> "No known case of any jurisdiction has held that simple denial of an up-zoning to a more valuable zoning constitutes a taking by land-use regulation."

Wrong. ***Hernandez v. City of LaFayette*** (5th Cir. 1981) 643 F.2d 1188 involved the refusal to rezone property which had been residentially zoned for more than 10 years. ***Sanfilippo v. County of Santa Cruz*** (N.D. Cal. 1976) 415 F.Supp. 1340 involved a refusal to rezone part of the land and a refusal to permit division of the remainder. ***See also Cordeco Dev. Corp. v. Vazquez*** (D. P.R. 1972) 354 F.Supp. 1355, involving the denial of a permit.

Under federal case law, a taking has been alleged. The complaints show no use for the property (and thus no value) as a result of the local government actions.

Palmdale, the County and the Court below appear to have confused pleading with proof, insisting on complaint allegations sufficient to disprove all potential defenses and sustain a judgment in the plaintiffs' favor. But this Court has never required such detailed pleading. *See e.g., Gomillion v. Lightfoot* (1960) 364 U.S. 339, 341:

> "At this stage of the litigation we are not concerned with the truth of the allegations, that is, the ability of petitioners to sustain their allegations by proof. The sole question is whether the allegations entitle them to make good on their claim that they are being denied rights under the United States Constitution."

That is why this Court found a claim properly stated in *Lake Country Estates* DESPITE the fact that the zoning ordinance, on its face, seemed to permit some use of the land, like the ordinances at bench (see discussion at JS 24). The plaintiffs there were entitled to a *trial* to determine whether those purported uses were real or bogus. Here, the facially permitted uses can be shown to be bogus (see JS 9, fn.5).

Under federal law, a taking is alleged. A trial is appropriate.

CONFLICT WITH SETTLED DECISIONS OF THIS COURT IS A REASON TO *TAKE* THIS CASE, NOT *REJECT* IT.

Palmdale's argument at pages 8-11 of its motion is difficult to fathom.

That argument deals with Questions 4 and 5 regarding:

- the propriety of a regulation enacted for an unconstitutional reason, and
- the necessity for state courts to enforce federal remedies when federal claims are presented in state courts.

The points raised by the Appellants were that the California courts defied settled federal law by:

- refusing to invalidate municipal action which was unconstitutionally motivated (JS 27-28), and
- refusing to accept the availability of a compensatory remedy mandated by federal law (JS 10-19).

Palmdale's curious response is *not* to defend (or even seek to explain) the actions of the California courts, but rather to assert that because this Court has clearly established the principles (which were not followed below), no substantial federal question is presented here EVEN THOUGH THE CALIFORNIA COURTS FLAGRANTLY VIOLATED THOSE PRINCIPLES.

Nonsense.

This Court has frequently noted the necessity of reviewing state court decisions because of conflict with earlier decisions of this Court. E.g.,:

> "We granted certiorari to decide whether the holding of the Florida Supreme Court was consistent with decisions of this Court including [citations]. We reverse."
> (***William E. Arnold Co. v. Carpenters*** [1974] 417 U.S. 12, 14).

> "Because the decision [of the Pennsylvania Supreme Court] appeared to be in conflict with the applicable decisions of this Court, we granted certiorari, [citation] and we now reverse the judgment."
> (*Pittsburgh v. Alco Parking Corp.* [1974] 417 U.S. 369, 371-372).

This Court has indeed provided answers to questions 4 and 5. But California refuses to apply this Court's teachings in land use cases, as these pending appeals demonstrate.

That is a reason to reverse the judgments, not to dismiss the appeals.

CONCLUSION

The chaotic state of the law of takings calls for this Court's intervention. The Gillilands and Mrs. Fitz pray that probable jurisdiction be noted.

Respectfully submitted,

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